

***United States Court of Appeals
for the Second Circuit***



APPENDIX

75-7131

ORIGINAL

In The
United States Court of Appeals
For The Second Circuit

JOHN A. GAVIN,

Plaintiff-Appellee,

vs.

TECHNICAL TAPE, INC., and TUCK INDUSTRIES, INC.,

Defendants-Appellants.

-APPELLANTS' APPENDIX

Volume I, pp. 1a - 258a

SMITH & PANISH

Attorneys for Defendants-Appellants

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New York, New York 10022

371-7900

(8298)

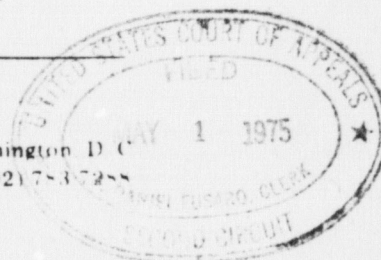
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CIVIL DOCKET
UNITED STATES DISTRICT COURT

Jury demand date:

D. C. Form No. 104 Rev.

by plttf 5-14-73

JUDGE WENFELD

73 CIV. 2120

TITLE OF CASE

JOHN A. GAVIN

AGAINST,

TECHNICAL TAPE, INC. AND TUCK INDUSTRIES, INC.

For plaintiff:

PARKER, CHAPIN & PLATTAU

530 Fifth Avenue,

N.Y., N.Y. 10036

986-7200

2-10-75

For defendant: both debts

Gilberfeld, Darringer & Bangs

230 Park Ave., NYC 10017 - 889-0000

Subst. of Att.

BRADEN AREA, STATE, MARSHAL & PLOW

919 Third Av. N.Y. 10022

Subst. of Att.

Gerald A. Fox

1 LaFevre Lane, New Rochelle, NY 10801

Smith, Parish and Cetlan

635 Madison Ave, NYC 10022 371-7900

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DEB.
J.S. 5 mailed E	Clerk	5/14/73	Receipt No.	15	-
J.S. 6 mailed	Marshal	5/14/73	U.S. Marsh.		
Basis of Action:	Docket fee				
REMARKS OF CONTRACT.	Witness fees				
Action arose at:	Depositions				

JOAHN A. GAVIN VS. TECHNICAL TAPE INC. ET AL

JUDGE
78 CIV. 212

DATE	PROCEEDINGS	Date Court Judgment
May 14-73	Filed Complaint, Issued Summons.	
May 21-73	Filed summons with marshal's ret. Served: Technical Tape, Inc. by Mr. Greenberg, V.P. on 5/15/73. Tuck Industries, Inc. by Mr. Greenberg on 5/15/73.	
May 29-73	Filed stip. and order extending defts' time to answer to 6/29/73. Weinfield, J.	
May 29-73	Filed stip. and order that the time for defts' to answer complaint is extended to 7-16-73. Weinfield, J.	
May 29-73	Filed ANSWER by both defendants.	
May 29-73	Filed pliffs notice of examination of pliff. on 8-2-73 at the offices of defts. Attorneys and request to produce certain documents.	
May 29-73	Filed stip. and order that the examination before trial of pliff. is adj. to 9-18-73 -- Weinfield, J.	
May 29-73	Filed by pliff notice to take deposition of the defendants on 9-18-73 at 10:30 AM at the offices of Silberfeld, Danziger & Bangser, 230 Park Ave., NYC	
May 29-73	Filed stip. and order that the exam. before trial of pliff. now scheduled for Sept. 18, 1973 is adj. to Oct. 24, 1973 and that the exam. before trial of defts. will immediately follow the exam. of pliff. So ordered, Weinfield, J.	
Oct 30-73	Filed Stipulation order hereby extended to 11/5/73 - to make motions w/ respect to said depositions - Weinfield, J.	
Nov 12-73	Filed Notice of Motion for a Protective Order returnable 11/20/73, deferring the depositions of defts. until 1/8/74 etc.	
Nov 12-73	Filed Memorandum of Law in Support of Defts. Motion for a Protective Order	
Nov 21-73	Filed Stipulation substituting attorneys from Silberfeld, Danziger Bangser to Skadden, Arps Slate, Meagher & Flom - Weinfield, J.	
Nov 21-73	Filed affdvt. of Amos Alter (pliff) in opposition to defts motion for a protective order.	
Nov 21-73	Filed memo endorsed on defts. motion for a protective order filed 11-12-73! The motion by deft. for a protective order is granted to the extent indicated in this endorsement. - So ordered. - Weinfield, J. (m/n)	
Dec 26-73	Filed affdvt. and notice of motion for a protective order (motion by defts.) ret. Jan 2-74 at 2:15 PM	
Dec 26-73	Filed defts. memorandum of law in support of motion for a protective order.	
Jan. 7-74	Filed memorandum of law in support of defts. motion for a protective order.	
Jan. 7-74	Filed pliffs. affdvt. of Amos Alter in opposition to defts. motion for protective order.	
Jan. 7-74	Filed memo end. on defts. motion dated Dec. 26, 1973 for a protective order and for an order adj. deposition of deft. until Feb. 28, 1974, etc. --- The motion is granted only to the extent of adj. the deposition of the deft. Mr. Gerald Sprayregen until such time as he shall have recovered. The deft. will be required to give at least 5 days notice of his availability for the taking of the deposition. otherwise the motion is denied. So ordered, Weinfield, J. m/n	
Feb. 20-74	Filed stip. and order that Gerald A. Fox, now representing defts. in this matter in place of Skadden, Arps, Slate, Meagher and Flom. So ordered, Weinfield, J.	
Feb. 18-74	Filed pliffs. affdvt. and notice of motion for an order striking defts. answer and rendering a judgment by default against them and to pay pliff. atty's fees, etc. ret. Feb. 26, 1974.	
Feb. 25-74	Filed defts. Technical Tape, Inc. affdvt. of Gerald A. Fox as counsel to pliffs. motion for an order striking defts. answer and rendering judgment by default against them.	

see Pg 3

DATE	PROCEEDINGS
Feb. 26-74	Filed defts. Technical Tape, Inc. affdt. of Gerald A. Fox
Feb. 27-74	Filed memo end. on plffs. motion dated Feb. 18, 1974--The motion by plff. is granted only to the extent that the defts. Technical Tape, Inc. and Tuck Industries, Inc. shall appear by Mr. Gerald Sprayregen, Chairman of the Board on March 7, 1974 at 10am at the office of plffs. counsel, subject to the terms and conditions as agreed upon between plff. and deft. in lieu of witness's alleged physical condition. Settle order on notice. Weinfeld, J. m/n (F. A. 11-4)
Mar. 1-74	Filed memo end. on defts. Technical Tape, Inc. affdt. dated Feb. 26, 1974. The attached affdt. was submitted without leave and after the motion was disposed of; accordingly it will not be considered and is not deemed part of the court's facts. Weinfeld, J. m/n
Mar. 1-74	Filed plffs. affdt. of Amos Alter in opposition to motion by defts. ret. on March 5, 1974 for a protective order.
Mar. 4-74	Filed defts. OSC--ORDERED that plff. show cause on March 5, 1974 in rm. 102 at 2:15pm why an order should not be made granting defts. leave to reargue plffs. motion, etc.; FURTHER ORDERED that personal service of a copy of this order be served on plffs. attys. on or before March 2, 1974 by nood. Weinfeld, J.
Mar. 4-74	Filed memorandum of defts. in support of motion for reargument.
Mar. 4-74	Filed ORDER--ORDERED that the motion (plff. moved for an order striking defts. answer for failure to comply with a previous order of this Court is granted to the extent of directing that defts. appear for deposition at 10am on March 7, 1974, etc. as indicated. Weinfeld, J. m/n
Mar. 7-74	Filed memo end. on deft.'s OSC dated Mar. 4, 1974 to grant defts. leave to reargue plffs. motion, etc.--Motion for leave to reargue which in effect is a motion to relieve defts. of their default in failing to appear in connection with the motion made last week is granted on the conditions hereafter noted. Upon plffs. consent, plff. Gavin shall be deposed first his deposition to be taken on Mar. 11, 1974 in rm. 601 at 10am in this courthouse, unless the parties otherwise stipulate as to the time and place for taking of deposition. A further condition is that defts. pay to plff. the sum of \$150.00 as expenses for this motion, etc. as indicated. So ordered, Weinfeld, J. m/n
May 13-74	Filed stip. and order that plffs. motion for partial summary judgment is adj. to May 21, 1974 and that plff. is to receive defts. papers in opposition by May 16, 1974. So ordered, Weinfeld, J.
May 28-74	Filed memo end. on defts. motion dated May 28, 1974 for an order granting defts. leave to serve an amended answer--Motion granted solely to the extent indicated upon the stenographic record. In all other respects, the motion is denied. Settle proposed order consented to as to form. Weinfeld, J. m/n (F. A. 11-4)
May 28-74	Filed defts. affdt. and notice of motion for an order granting defts. leave to serve an amended answer, etc. ret. on: May 21, 1974.
May 28-74	Filed plffs. affdt. and notice of motion granting plffs. interrogatory judgment (summary), etc. ret. on: May 14, 1974.
May 28-74	Filed plffs. reply affdt. of John Gavin.
May 28-74	Filed plffs. affdt. of Amos Alter in opposition to defts. motion for leave to serve an amended answer.
May 28-74	Filed defts. affdt. of Gerald Sprayregen affdt. in opposition to plffs. motion for interrogatory summary judgment.
May 28-74	Filed plffs. reply to Rule 9(g) counterstatement.
May 28-74	Filed memorandum of law of defts. in support of motion to amend answer.

DATE	PROCEEDINGS
May 28-74	Filed defts. memorandum of law in opposition to summary judgment motion.
May 28-74	Filed pliffs. reply memorandum of law in support of motion for summary judgment.
May 28-74	Filed pliffs. memorandum of law in support of summary judgment.
May 28-74	Filed memo end. on pliffs. motion dated May 28, 1974 for an order granting pliff. interlocutory summary judgment---Motion denied as indicated upon stenographic record. Settle proposed order consented to as to form.
	Weinfeld, J. m/n (E. Apr. 74)
Jul 5-74	Filed ORDER--ORDERED that since leave to serve an amended answer was granted, the motion by pliff. for summary judgment is denied. Weinfeld, J.
Jul 5-74	Filed ORDER--ORDERED that defts. motion for leave to serve an amended answer is granted to the extent that the defts. are permitted to serve the amended answer within 10 days from the date hereof to include the defenses of estoppel and waiver and also a single counterclaim advancing whatever its plea may be and in all other respects the motion to amend the answer is denied. Weinfeld, J. m/n
7-25-74	Filed Transcript of record of proceedings, dated May 21, 1974
Jul 15-74	Filed defts. amended answer to complaint.
Jul 31-74	Filed pliffs. reply to counterclaims of defts. amended answer.
Jul 31-74	Filed pliffs. notice to take deposition of defts. on Aug. 7, 1974.
7-15-74	PRE-TRIAL CONFERENCE HELD BY Mag. Schreiber
Aug. 12-74	Filed stip. and order that the deposition upon oral exam of defts. by Gerald Sprayregen is adj. until Aug. 21, 1974, same time and same place. So ordered, Weinfeld, J.
Aug. 28-74	Filed stip. and order that the deposition of defts. by Gerald Sprayregen is adj. to Sept. 12, 1974 and that the deposition of the pliff. now sch. for Aug. 22, 1974 is adj. to Sept. 13, 1974. So ordered, Weinfeld, J.
Sep. 13-74	Filed stip. and order that the deposition of defts. by Gerald Sprayregen on for Sep. 12, 1974 is adj. to Sept. 20, 1974 and that the deposition of pliff. on for Sept. 13, 1974 is adj. to Sept. 24, 1974. So ordered, Weinfeld, J.
9-16-74	PRE-TRIAL CONFERENCE HELD BY Mag. Schreiber
9-19-74	PRE-TRIAL CONFERENCE HELD BY Mag. Schreiber
9-24-74	PRE-TRIAL CONFERENCE HELD BY Mag. Schreiber
Nov. 21-74	Filed defts. notice to supplement amended answer. (O. Weinfeld)
Nov. 21-74	Filed pliffs. notice to produce documents to defts.
Dec. 11-74	Filed memo end. on copy of pliffs. OSC to strike defts. answer, etc.--- Motion withdrawn. See attached letter dated Dec. 6, 1974. So ordered, Weinfeld, J. m/n
01-09-75	Filed defendants affdvt. in opposition to motion for interlocutory judgment.
01-09-75	Filed defendant's memorandum of law in opposition to summary judgment motion.
01-09-75	Filed pliff's memorandum in support of his motion
01-09-75	Filed deff's counterstatement under Rule 9(a)
01-09-75	Filed pliff's reply to Rule 9(a) counterstatement
01-09-75	Filed pliff's reply affdvt. of Amos Alter.
01-09-75	Filed pliff's affdvt. notice of motion for interlocutory summary judgment - ret. 12-31-74 (also 9(a) statement attached)
01-06-75	NON-JURY TRIAL begun before Weinfeld, J.
01-07-75	Trial continued
01-08-75	Trial continued and concluded. -- Judge's decision for the pliff. in the sum of \$39,855.19

John A. Gavin v. Technical Tape Inc. et. ano.

73 CIV 2120

page 3

Judge Weinfeld

D. C. 110 Rev. Civil Docket Continuation

PROCEEDINGS

DATE	PROCEEDINGS
11-10-75	Filed defendant's memorandum of law before trial.
11-10-75	Filed plaintiff's trial memorandum
11-10-75	Filed plaintiff's proposed findings and conclusions.
11-10-75	Filed OPINION # 41707 and Findings of Fact and Conclusions of law. For reasons stated, plaintiff is entitled to a net recovery of \$39,855.19, to which there is to be added interest from the date of discharge, April 6, 1973. Costs may be taxed in accordance with the Rules. The foregoing constitutes the Court's Findings of Fact and conclusions of Law. -- Weinfeld, J. m/n
11-12-75	Filed JUDGMENT #75,049-ORDERED, ADJUDGED and DECREED: that the pliff, John A. Gavin, has judgment against the defts, Technical Tap, Inc. and Tuck Industries Inc. in the amount of \$39,855.19 with interest from the date of discharge 4/6/73 -- Clerk
1-28-75	Filed bill of costs on Judgement-# 75,049 in the sum of 1,001.50
2-10-75	Filed defts. notice of appeal to the U.S.C.A. for the Second Circuit -from the final judgment -entered 2-13-75 --m/copy to Patrick Chapin & Plattner, Esqs.
2-17-75	Filed defendants affdvt. and O.S.C. for a stay and to amend opinion of 1-10-75 -- ret. 1-28-75
2-07-75	Filed memo endorsed on above O.S.C.: Defendant's motion for a stay is hereby granted till Monday 2-10-75 -- Weinfeld, J. m/n
2-07-75	Filed pltf's surreply affdvt. of Amos Alter.
2-07-75	Filed affdvt.(defendants) in support of application to amend opinion.
2-07-75	Filed pltf's affdvt. of Amos Alter in opposition to deft's motion to amend op.
2-07-75	Filed pltf's memorandum of law in opposition to motion for a new trial/
2-07-75	Filed deft's memorandum of law in support of mot. to amend op.
2-07-75	Filed deft's suppl. memorandum of law
2-07-75	Filed OPINION #41849...That the Court's Findings at page 9, 13th line are amended as indicated herein. In all other respects the motion to retry is denied. Submit order in accordance with the foregoing within five days from date hereof. -- Weinfeld, J. m/n
2-25-75	Filed amended notice of appeal

A TRUE COPY

RAYMOND E. BURNHARDT, Clerk

Deputy Clerk

COMPLAINT (FILED MAY 14, 1973)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - x

JOHN A. GAVIN,

Plaintiff,

-against-

TECHNICAL TAPE, INC., and TUCK
INDUSTRIES, INC.,

Defendants.

- - - - - x

Plaintiff, by his attorneys, Parker, Chapin and
Flattau, for his complaint alleges as follows:

1. Plaintiff is a citizen of the State of New
Jersey.

2. Upon information and belief, defendant Techni-
cal Tape, Inc., is a Michigan corporation with its prin-
cipal place of business in a jurisdiction other than the
State of New Jersey.

3. Upon information and belief, defendant Tuck
Industries, Inc., is a Michigan corporation with its
principal place of business in a jurisdiction other
than the State of New Jersey. Defendant Tuck Indus-

Complaint (Filed May 14, 1973)

tries, Inc. is also known as Technical Tape Corp.

4. The amount in controversy, exclusive of costs and interests, exceeds \$10,000.00.

FOR A FIRST CLAIM

5. By written agreement dated as of April 5, 1971, plaintiff, as employee, and defendants, jointly as employer, entered into an employment agreement.

6. By written agreement effective as of April 4, 1972, the said contract was amended in respect to plaintiff's compensation and duties.

7. The contract as amended provided for a salary to plaintiff of \$50,000 per annum.

8. Plaintiff duly entered into the employment of the defendants, and duly performed his duties under the said contract as amended, until thereafter wrongfully prevented from doing so by defendants, as hereinafter alleged.

9. On or about April 6, 1973, defendants wrongfully discharged plaintiff.

Complaint (Filed May 14, 1973)

10. No part of plaintiff's salary for the period following April 19, 1973 has been paid, although duly demanded.

FOR A SECOND CLAIM

11. Plaintiff repeats the allegations of Paragraphs 5, 6, 8 and 9 hereof.

12. The said contract provided for severance pay, in the amount of \$35,000 per annum until April 5, 1974, should defendants terminate plaintiff's employment.

13. No part of the severance pay has been paid, although duly demanded.

FOR A THIRD CLAIM

14. Plaintiff repeats the allegations of Paragraphs 5 through 8 hereof.

15. The said contract as amended provided that for defendants' fiscal years of 1972 and 1973 plaintiff was entitled to receive 2.5% of the increment net income from operations for the respective years over net income from operations for fiscal year 1971.

Complaint (Filed May 14, 1973)

16. By reason of the increment of fiscal 1972 net income over fiscal 1971 net income, plaintiff is entitled to a sum the precise amount of which is at present unknown to plaintiff, but which upon information and belief exceeds \$12,500.00.

FOR A FOURTH CLAIM

17. Plaintiff repeats the allegations of Paragraphs 5 through 8 and 15 hereof.

18. By reason thereof, plaintiff will be entitled to 2.5% of the increment of fiscal 1973 net income over fiscal 1971 net income.

WHEREFORE, plaintiff demands judgment against the defendants

(1) On his first claim, in the amount of \$48,082.19;
 (2) On his second claim, in the amount of \$35,000.00;
 (3) On his third claim, in the amount of \$12,500.00,
 or such greater sum to which plaintiff shall prove entitled;

(4) On his fourth claim, declaring defendants liable to plaintiff for 2.5% of the increment of fiscal 1973 net

Complaint (Filed May 14, 1973)

income over fiscal 1971 net income;

(5) For the costs and disbursements of the action;
and

(6) For such other and further relief as the Court
may deem proper.

PARKER, CHAPIN AND FLATTAU

By: (illegible)
A Member of the Firm
Attorneys for Plaintiff
530 Fifth Avenue
New York, New York 10036
(212) 986-7200

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-----X

JOHN A. GAVIN,

Plaintiff :

73 Civ. 2120 (EW)

-against- :

AMENDED ANSWERTECHNICAL TAPE, INC. and TUCK
INDUSTRIES, INC., :Defendants
-----X

The defendants, as and for their amended answer, granted by Court order entered on July 5, 1974, by their attorneys of counsel, SMITH, PANISH & GETLAN, allege:

1. Deny knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph one (1) of the complaint.
2. Specifically deny that the defendant, TUCK INDUSTRIES, INC., is a Michigan Corporation as alleged in paragraph three (3).
ANSWERING THE FIRST CLAIM
3. Deny each and every allegation contained in paragraph five (5) of the complaint except that certain agreements were entered into on or about April 5th, 1971 and the defendants beg leave to refer this Court as to their complete terms and conditions and the legal effect thereof.
4. Deny each and every allegation contained in paragraph six (6) of the complaint except that there was a certain amendment in respect to the plaintiff's compensation and duties and in addition thereto, there were also other amendments.
5. Deny each and every allegation contained in paragraph seven (7) of the complaint except that there was a provision for an increase in salary.

6. Deny each and every allegation contained in paragraph 12a eight (8) of the complaint except that the plaintiff did enter into certain portions of his employment agreements and the defendants specifically deny that the plaintiff duly performed his duties under all the contracts and as amended, and further that the plaintiff failed to properly perform his duties as set forth in the counterclaim hereinafter contained in this amended answer.

7. Deny each and every allegation contained in paragraphs 9 and 10 of the complaint.

ANSWERING THE SECOND CLAIM:

8. The defendants deny except as heretofore admitted, each and every allegation contained in paragraph 11 of the complaint.

9. Deny each and every allegation contained in paragraphs 12 and 13 of the complaint.

ANSWERING THE THIRD CLAIM:

10. The defendants deny except as heretofore admitted, each and every allegation contained in paragraph 14 of the complaint.

11. Deny each and every allegation contained in paragraph 15 of the complaint except that there was a certain amendment in respect to a percentage of the increment net income from operations, however subject to the exclusion of special items and to limitations based upon the earnings of the acquired companies and to certain other exclusions as may thereafter be determined by the Board of Directors.

12. Deny each and every allegation contained in 13a
paragraph 16 of the complaint.

ANSWERING THE FOURTH CLAIM:

13. The defendants deny except as heretofore admitted to each and every allegation contained in paragraph 17 of the complaint.

14. Deny each and every allegation contained in paragraph 18 of the complaint.

FOR A FIRST AFFIRMATIVE DEFENSE:

15. In connection with the agreements entered into between the parties on or about April 5th, 1971, the plaintiff claims that there can be no modification or termination thereof unless it is in writing and signed by the plaintiff and the defendants.

16. Notwithstanding the aforesaid provision, and subsequent to April 5th, 1971 there have been certain modifications thereof, which were not signed by the plaintiff and the defendants, including but not limited to, an elevation in position, an increase in salary, a percentage of increments of net income subject to certain limitations of the Board of Directors, the time when the compensation is payable, payment of medical insurance, and bonuses.

17. The plaintiff has also terminated his employment and resigned therefrom which has been accepted by the Board of Directors of the defendants.

18. The plaintiff well knew that the modifications aforesaid in respect to the elevation in his position, his increase in salary, the stated percentage increments, the time

of payment of his salary, the defendants payment of the plaintiff's medical insurance, the payments of bonuses were all benefits which the plaintiff accepted even though he did not execute any agreement in writing.

19. Most of, if not all of the aforesaid benefits received by the plaintiff were reflected in the Board of Directors minutes of the defendants, or in certain interoffice memoranda.

20. The plaintiff's termination and resignation of his services to the defendants was duly accepted by the Board of Directors and is so reflected in the minutes of the Board of Directors of the defendants.

21. That by reason of the foregoing, the plaintiff is estopped from alleging that a modification or termination of the agreements of April 5th, 1971 or any of them is not valid unless in writing and signed by the plaintiff and the defendants.

FOR A SECOND AFFIRMATIVE DEFENSE:

22. The defendants repeat and reallege each and every allegation contained in paragraphs "15" through "21" inclusive of this answer with the same force and effect as though fully set forth at length herein.

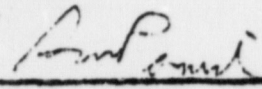
23. That by reason of the foregoing, the plaintiff waived the alleged requirement for a writing to be executed by both parties in the event of a modification or termination of the agreement or agreements referred to.

WHEREFORE the defendants demand judgment as follows:

(a) The defendants demand judgment dismissing the complaint herein, together with the costs and disbursements of this action.

GERALD A. FOX
Attorney for Defendants

By: SMITH, PANISH & GETLAN,
Of Counsel

By: 
SAM PANISH, Counsel
Office & P.O. Address
635 Madison Avenue
New York, New York 10022
(212) 371-7900

REPLY TO COUNTERCLAIM OF DEFENDANTS AMENDED ANSWER
FILED JULY 31, 1974

16a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
JOHN A. GAVIN, :
 :
Plaintiff, :
 :
-against- : 73 Civ. 2120 (EW)
 :
TECHNICAL TAPE, INC., and TUCK : REPLY
INDUSTRIES, INC., :
 :
Defendants. :
 :
-----X

Plaintiff, by his attorneys. Parker, Chapin and Flattau,
for his reply to the counterclaim of defendants' amended answer,
asserts as follows:

1. Denies the allegations of Paragraphs 32 and 33 of the amended answer.
2. Denies the allegations of the second clause of the second sentence. and of the third sentence, of Paragraph 34 of the amended answer.
3. Denies knowledge or information sufficient to form a belief as to the allegations of Paragraph 35 of the amended answer.
4. Denies the allegations of Paragraph 36 of the amended answer.
5. Denies the allegations of Paragraph 38 of the amended answer, except denies knowledge or information sufficient to form a belief as to the subsequent sales by Tuck as alleged.
6. Admits handling and entering into negotiations with

Spec Tape as alleged in Paragraph 39 of the amended answer, but otherwise denies the allegations of the said paragraph.

7. Denies the allegations of Paragraph 40 of the amended answer.

8. Denies knowledge or information sufficient to form a belief as to the allegations of Paragraphs 41 and 42 of the amended answer.

9. Admits that he negotiated a contract with Horizon Brands Corp. as alleged in Paragraph 43 and referred to in Paragraph 46 of the amended answer, and refers to the contract for the terms thereof; and otherwise denies the allegations of the said paragraphs.

10. Denies knowledge or information sufficient to form a belief as to the allegations of Paragraph 45.

11. Denies the allegations of Paragraphs 48, 50, 51 and 52 of the amended answer.

FOR A FIRST AFFIRMATIVE DEFENSE:

12. Insofar as the amended answer is inconsistent with the order granting leave to serve it, it is not properly interposed against plaintiff.

FOR A SECOND AFFIRMATIVE DEFENSE:

13. The defendants' counterclaim, and all the counterclaims attempted to be stated therein, fails to state any claim upon which relief can be granted against plaintiff.

FOR A THIRD AFFIRMATIVE DEFENSE:

14. The defendants' counterclaim fails to state a

proper claim by reason of improper comingling of numerous purported claims.

FOR A FOURTH AFFIRMATIVE DEFENSE:

15. Certain of the claims asserted in defendants' counterclaim are barred by the statute of limitations.

FOR A FIFTH AFFIRMATIVE DEFENSE:

16. Certain of the claims asserted in defendants' counterclaim are barred by the statute of frauds.

WHEREFORE, plaintiff demands judgment against defendants dismissing the counterclaim and for further judgment as prayed for in the complaint.

Dated: New York, New York
July 25 , 1974

PARKER, CHAPIN AND FLATTAU

By 

A Member of the Firm
Attorneys for Plaintiff
530 Fifth Avenue
New York, New York 10036
(212) 986-7200

TO:

GERALD A FOX, ESQ.
Attorney for Defendants
1 LeFevre Lane
New Rochelle, New York 10022

TRANSCRIPT OF PROCEEDINGS BEFORE WEINFELD, J. ON
JANUARY 6, 7, 8, 1975

19a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN A. GAVIN,

Plaintiff,

vs.

TECHNICAL TAPE, INC., and
TUCK INDUSTRIES, INC.,

Defendants.

X

:

: Before:

:

HON. EDWARD WEINFELD,
District Judge.

:

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:

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:

:

:

X

New York, January 6, 7, 8, 1975

STENOGRAPHER'S MINUTES

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x
4 JOHN A. GAVIN, :

5 Plaintiff, :

6 vs. :

73 Civ. 2120
(IW)

7 TECHNICAL TAPI, INC., and :
8 TUCK INDUSTRIES, INC., :

9 Defendants. :
10 -----x

11 Before:

12 HON. EDWARD WEINFELD,

13 District Judge.

14
15 New York, January 6, 1975,
16 10:00 a.m.

17 APPEARANCES:

18 PARKER, CHAPIN & FLATTAU, ESQS.,

Attorneys for plaintiff;

19 Joel M. Wolosky, Esq.,

Amos Alter, Esq., of counsel

20 SMITH, PANISH & GETLAN, ESQS.,

Attorneys for defendants;

21 Sam Panish, Esq., of counsel,

and

22 GERALD A. FOX, ESQ.

23 --
24
25

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2

MR. WOLOSKY: Plaintiff is ready.

MR. PANISH: Ready, your Honor.

THE COURT: All right, proceed.

MR. WOLOSKY: Your Honor, I have one or two preliminary matters that I would like to bring up to the court. We have not received a copy of the defendants' trial memorandum or the defendants' proposed findings of fact and conclusions of law, although we two weeks ago by hand delivered plaintiff's trial memo and proposed findings and conclusions.

We would request copies of them at this time.

In addition, your Honor, we previously moved to dismiss the defendants' affirmative defenses and cross claims on the theory that they are insufficient in law, asserted in bad faith and asserted solely for the purpose of harassing the plaintiff. We would renew that motion at this time for the additional reason that in their pretrial memo the defendants have listed approximately 40 witnesses which they intend to call on the trial of this action.

It is anticipated that the plaintiff will testify on direct examination this morning and only maybe possibly into the early afternoon, no more than that. I would anticipate that we would be finished

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2 with the plaintiff this morning.

3 What I am urging, your Honor, is that this
4 is a rather simple case from the plaintiff's point of
5 view, and after reading counterclaims and affirmative
6 defenses and researching the law we still believe it is
7 a simple case from the plaintiff's point and we do not
8 see how the defendants can possibly call 40 witnesses
9 in this action. We are concerned that a simple case
10 like this is going to be turned into a month-long or --

11 THE COURT: You can be sure it won't be
12 a month-long case. Stop that nonsense. No case of
13 this type will ever take a month before this court.
14 If need be we will sit late at night.

15 Of course, you know one of the problems is,
16 I questioned you the other day why you waited until the
17 eve of trial to make this motion. You said it was
18 a matter of strategy. I don't know whether it was
19 you or your associate.

20 MR. WOLOSKY: I believe Mr. Alter made the
21 motion.

22 THE COURT: This doesn't explain at all
23 why this motion was not made promptly. We will proceed
24 with the trial. I don't see how I can pass upon a
25 motion of this kind where you are charging bad faith with-

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2 out hearing some evidence.

3 I am inclined to think that this is a highly
4 exaggerated defense and counterclaim. I said that
5 originally when I gave leave to serve the amended answer.
6 On its face it seems questionable but I can't decide
7 it out of hand.

8 MR. WOLOSKY: I might add, your Honor,
9 that you gave leave to serve one of a number of proposed
10 counterclaims --

11 THE COURT: We will move along with the
12 trial. As the evidence develops the court will
13 have a clearer idea what disposition to make of it.

14 MR. PANISH: At this time on behalf of the
15 defendants, pursuant to a notice dated November 20, 1974,
16 and I apprised counsel of it by serving a copy of it
17 and also by including it in my pretrial memorandum
18 to the magistrate, to supplement the amended answer to
19 include the defense of accord and satisfaction due to
20 the fact that the allegations set forth in this proposal
21 was not made known to the defendant until a few days be-
22 fore this notice was served.

23 THE COURT: I don't see how that possibly
24 could be. It was the defendants' own check, was it
25 not, that was delivered?

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MR. PANISH: It was, except this is --

THE COURT: We will spend no more time on it. I have never seen a case that was more confusing as far as proper procedure on the part of attorneys is concerned. That applies to you and applies to the plaintiff as well. There was no reason why the plaintiff hadn't moved with respect to the latest amended pleading to have stricken it, if the plaintiff's position is sound, months ago, immediately after it was served instead of waiting until the eve of trial.

You waited until I fixed the date of trial and then served this.

MR. PANISH: No.

THE COURT: We will spend no more time. Your motion is denied. The case will proceed. Call the first witness.

MR. PANISH: I have one more thing. I want to reduce the amount, if I may, if I may, in my amended answer, paragraph 49. On the last line of that paragraph there is an amount mentioned of \$652. I would like to have that reduced at this time to \$587.10.

THE COURT: The record may indicate that.

MR. WOLOSKY: The plaintiff calls John A. Gavin.

1 rda

2 J O H N A. G A V I N, the plaintiff

3 herein, called as a witness, being first duly

4 sworn, testified as follows:

5 DIRECT EXAMINATION

6 BY MR. WOLOSKY:

7 Q Mr. Gavin, are you the plaintiff in this
8 action?

9 A Yes.

10 Q And are you familiar with the defendants?

11 A Yes.

12 Q And in the years 1971, 1972 and 1973 can
13 you tell me what businesses the defendants were pri-
14 marily engaged in?

15 A Manufacture of pressure sensitive tape.

16 THE COURT: Manufacture of what?

17 THE WITNESS: Pressure sensitive tape, ad-
18 hesive tape.

19 Q Is the defendant Technical Tape, Inc. a
20 publicly owned corporation?

21 A Yes.

22 Q And is its shares of stock traded on the
23 American Stock Exchange?

24 A Yes.

25 Q And is Tuck Industries a subsidiary of Tech-

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1 nical Tape Corp.?

2 A Yes.

3 Q Was its name changed to Tuck Industries some-
4 time in the year 1971 and 1972?

5 A Yes.

6 C Is Technical Tape, Inc., the public company,
7 primarily a holding company?

8 A Primarily, yes.

9 Q And is its subsidiary, Tuck Industries,
10 primarily the operating company?

11 A Yes.

12 Q Mr. Gavin, did there come a time when you
13 became employed by Technical Tape, Inc.?

14 A Yes.

15 Q And when for the first time did you become
16 employed by Technical Tape, Inc.?

17 A June 1, 1959.

18 Q And at that time what position did you hold
19 at Technical Tape, Inc.?

20 A I was a salesman.

21 Q And were you selling pressure sensitive tape?

22 A Yes.

23 Q And for how long did you remain with Technical
24 Tape, Inc. at that particular time?
25

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2 A Approximately two and a half years.

3 Q And after you left Technical Tape, Inc. that
4 time did you again at some future time obtain employment
5 with a company in the pressure sensitive tape business?

6 A Yes.

7 Q And when did you next obtain employment
8 in the pressure sensitive tape business?

9 A January of 1963.

10 Q I take it between the time you left Technical
11 Tape the first time and January, 1963 you were employed
12 by a business other than the pressure sensitive tape
13 business?

14 A Yes.

15 Q And in January, 1963 by what company did you
16 become employed?

17 A The Mystic Tape Division of Borden, Inc.

18 Q And in January, 1963 what position did you
19 hold at that company?

20 A I was hired as a salesman.

21 Q And I take it Mystic was in the business of
22 manufacturing and selling pressure sensitive tape?

23 A Yes.

24 Q Did there come a time when you received a
25 promotion at Mystic?

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A Yes.

3

4

Q When for the first time did you receive a promotion?

5

A In June of 1963.

6

Q And to what position were you promoted?

7

A Middle Atlantic regional manager.

8

9

Q What were your duties and responsibilities in that position?

10

11

A I supervised the sales activities of six salesmen in the Middle Atlantic region.

12

13

Q And in that position did you have the authority to hire and fire salesmen?

14

15

A I could hire on a qualified basis and I could fire unilaterally.

16

17

MR. PANISH: I didn't hear the last part, your Honor.

18

19

THE WITNESS: I said I could hire --

20

21

MR. WOLOSKY: Let the reporter read it.

THE COURT: We are not going back. State it again.

22

23

THE WITNESS: I said I could hire on a qualified basis and I could fire unilaterally.

24

25

Q And did there come a time when you received another promotion at Mystic?

1 rda Gavin-direct 10

2 A Yes.

3 Q And could you tell me when you received your
4 next promotion?

5 A April of 1965.

6 Q And what position were you promoted to at
7 that time?

8 A To national sales manager.

9 Q Could you tell me what were your duties
10 and responsibilities in that position?

11 A I supervised the sales activities of the
12 division, having approximately 56 salesmen and eight
13 regional managers.

14 Q And in that position did you have the authority
15 to hire and fire those under you?

16 A Yes.

17 Q And did there come a time when you received
18 another promotion at Mystic?

19 A Yes.

20 Q And when was that?

21 A August of 1967.

22 Q And to what position were you promoted?

23 A Director of sales and marketing.

24 Q And could you tell me what were your duties
25 and responsibilities in that position?

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1 A I held the total responsibility for the
2 sales and marketing for the Mystic Tape Division.
3

4 Q And in that position did you have the
5 authority to hire and fire?

6 A Yes.

7 Q Mr. Gavin, did there come a time when you
8 left the employ of Mystic?

9 A Yes.

10 Q And when was that?

11 A I believe it was May of 1970.

12 Q And I take it, Mr. Gavin, at the time you
13 left Mystic you were director of sales and marketing?

14 A Yes.

15 Q And when you started with Mystic in January
16 of 1963 can you tell me what your compensation was?

17 A \$700 per month.

18 Q And at the time you left Mystic in May of
19 1970 can you tell me what your compensation was then?

20 A I believe my total compensation, though it
21 is going by memory, approximately \$29,000.

22 Q In May of 1970 did you become employed by
23 another company in the pressure sensitive tape business?

24 A Yes.

25 Q And what was that company?

1 rda Gavin-direct

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2 A Ameican Biltrite Rubber Company.

3 Q Tell me what position you obtained at that
4 company?

5 A I was vice president of tape operations, hired
6 to consolidate three plants that they had under one roof
7 in Lakewood, New Jersey.

8 Q And did you have the authority to hire and
9 fire in your position at American Biltrite?

10 A Yes.

11 Q Could you tell me what your salary was at
12 American Biltrite?

13 A \$35,000 per year.

14 Q Did there come a time when you received an
15 offer to leave American Biltrite?

16 A Yes.

17 Q And could you tell me when you were first
18 contacted with respect to the possibility of leaving
19 American Biltrite?

20 A It would be late February or early March of
21 1971.

22 Q And by whom were you contacted?

23 A By Jim Peeney of Boyden Associates, a manage-
24 ment consulting firm.

25 Q And was he contacting you for a particular

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Gavin-direct

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position?

A Yes.

Q What position was that?

A The presidency of Technical Tape.

Q And do you know how the Boyden firm obtained your name?

A Yes, I was recommended to them by Milton Stohl, who had been my boss at Mystic Tape.

Q And at the time that you were first contacted by the Boyden firm did you express an interest in the position at Technical Tape?

MR., PANISH: Object to the form, your Honor.

THE COURT: We will take it.

Get down to the contract. Let's not spend so much time on preliminary matters.

MR. WOLOSKY: Your Honor, I believe that the preliminary matters will not take much longer and I believe that they will supply some necessary information here, if you will bear with me for just a few minutes.

May I have the last question read back?

(Question read.)

A Yes.

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1
2 Q And were you thereafter interviewed by the
3 Boyden firm?

4 A Yes.

5 Q And after your interviews with the Boyden
6 firm were you interviewed by people at Technical Tape?

7 A Yes.

8 Q And with whom was your first interview at
9 Technical Tape?

10 A Mr. Don Silvestri.

11 Q Approximately when was that interview?

12 A Early March, I would suspect.

13 Q And who was Mr. Silvestri?

14 A He was a vice president of Technical Tape.

15 Q Could you tell me what you discussed with
16 Mr. Silvestri at this first interview?

17 THE COURT: I would assume they discussed
18 the terms of a settlement and problems of mutual interest.
19 Do we have to spend time on that?

20 Q Mr. Gavin, were you also interviewed by a
21 Mr. Ed Chappell?

22 A Yes.

23 Q What was his position at Technical Tape?

24 A President.

25 Q Were you also interviewed by a Mr. Hurwitz?

1 rda Gavin-direct 15

2 A Yes.

3 Q And what was his position at Technical Tape?

4 A He did not have a position at Technical

5 Tape other than to be on the board of directors.

6 Q And did you also have an interview with Mr.

7 Charles Sprayregen?

8 A Yes.

9 Q And when did you have your interview with

10 Mr. Sprayregen?

11 A Oh, late March, I suppose.

12 Q And where did you have that interview?

13 A At his office at the Pan Am Building.

14 Q And what firm's offices did Mr. Sprayregen

15 have his office at?

16 MR. PANISH: Objection, your Honor.

17 A Sprayregen & Company was the sign on the door.

18 Q And did you meet with Mr. Sprayregen at his

19 offices in the Pan Am Building?

20 A Yes.

21 Q Did you have a discussion with him?

22 A Yes.

23 Q Can you tell me what was discussed with you

24 and Mr. Sprayregen?

25 MR. PANISH: Objection.

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2 THE COURT: What's the relevancy of that?

3 MR. WOLOSKY: Your Honor, there were cer-
4 tain discussions --

5 THE COURT: Wasn't it all merged in the
6 written contract?

7 MR. WOLOSKY: Your Honor, I don't believe that
8 what the witness will testify to is merged into the
9 written contract, nor does the written contract speak
10 to the point which the witness will now speak to.

11 THE COURT: I'll take it but I'm only taking
12 it because I'm sitting without a jury; that's all.
13 I will only consider evidence that's relevant, material
14 and admissible.

15 MR. PANISH: May I point out, your Honor,
16 that the plaintiff is bound by his pleading. In
17 paragraph 5 he sues on a specific written agreement dated
18 April 5, 1971. Therefore, any oral conversations
19 should not even be put in the record, jury or nonjury.

20 THE COURT: It can be put in because I will
21 disregard it. I feel we can save time. Let's move
22 along.

23 What's the relevancy of this, as long as I'm
24 allowing it in.

25 MR. WOLOSKY: Well, your Honor, there were

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1 certain representations made, there were certain
2 conversations about what the plaintiff's role would
3 be with the company --
4

5 THE COURT: Isn't that defined in the
6 contract?

7 MR.WOLOSKY: Your Honor, his position is
8 defined but I believe there were discussions with Mr.
9 Sprayregen regarding the scope of his authority.

10 THE COURT: I will go by the contract.
11 Let's move on, gentlemen. The reason I am taking it
12 is the experience I have had with the way you lawyers
13 have conducted this case up to now, and that applies to
14 lawyers on both sides, because I think we will save time
15 instead of listening to extensive argument on objections.

16 Q Did you have a conversation with Mr. Gerald,
17 Sprayregen when you met with him in the month of March,
18 1971?

19 A Yes.

20 Q And what did you discuss with Mr. Sprayregen?

21 A We discussed my coming to work for Technical
22 Tape. I was to be hired as senior vice president,
23 chief operating officer and be made president approxi-
24 mately 30 days after the board -- the annual stockholders
25 meeting, which was coming up at the end of April.

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2 We discussed matters pertaining to the problems within
3 the company.

4 I asked if there were any sacred cows,
5 since I could not accept the job if I didn't have author-
6 ity to move people out that I didn't think were good and
7 promote those that I did, and he said that was fine, he
8 had no problems except with Charley Katz, who was a
9 board member and who he wanted to handle personally.
10 Other than that, anybody else was fine.

11 Q Did Mr. Sprayregen tell you that he had other
12 business interests?

13 A Yes, he did. He told me he sat on the
14 board of some 30 listed companies. He was particularly
15 interested in Stratton, S-t-r-a-t-t-o-n, Group Limited,
16 which is largely made up of John's Bargain Stores, and
17 I believe also Sprayregen Securities and Sprayregen
18 Company were also part of that group.

19 Q And did Mr. Sprayregen tell you whether he
20 had a position at Technical Tape, Inc.?

21 MR. PANISH: This is leading and I object
22 to it at this time.

23 THE COURT: Objection sustained.

24 Q Did you discuss Mr. Sprayregen's position
25 at Technical Tape?

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2 A He had no position at Technical Tape. He
3 told me he was a deal maker and that he was interested
4 in me running the company on a day-to-day basis. He
5 had no particular interest in doing so himself.

6 Q Did Mr. Sprayregen tell you at that time
7 how much time he devoted to the business and affairs
8 of Technical Tape, Inc.?

9 MR. PANISH: That's objected to. It's
10 not germane to the issues in this case.

11 THE COURT: Sustained.

12 Please get down to the issues in the case.

13 MR. WOLOSKY: Your Honor, I believe --

14 THE COURT: Don't argue. Please proceed
15 within the framework of the issues as the pleadings now
16 exist.

17 BY MR. WOLOSKY:

18 Q Mr. Gavin, after your interview with Mr. Spray-
19 regen, were you hired?

20 A Yes, I was.

21 Q Did you enter into a written employment agree-
22 ment?

23 A Yes.

24 MR. WOLOSKY: May I have this marked
25 as Plaintiff's 1.

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(Plaintiff's Exhibit 1 was marked for
identification.)

xx BY MR. WOLOSKY:

Q Mr. Gavin, I show you Plaintiff's Exhibit 1
and ask you whether that is your signature, copy of
your signature.

A Yes.

Q And I ask you whether you recognize Mr. Chap-
pell's signature?

A Yes.

Q Did he sign on behalf of Technical Tape
Corp.?

A Yes.

MR. WOLOSKY: I would offer this.

Your Honor, may I read something?

MR. PANISH: May I see it?

MR. WOLOSKY: Yes (handing).

(Pause.)

MR. PANISH: No objection, your Honor.

(Plaintiff's Exhibit 1 was received in
evidence.)

xx Q Mr. Gavin, prior to your executing Plain-
tiff's Exhibit 1 did Technical Tape, Inc. have a president?

A Yes.

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Q And was that Mr. Chappell?

A Yes.

Q And did Mr. Chappell have a written contract?

A Yes.

MR. PANISH: Objection, your Honor.

Move to strike the answer.

THE COURT: What's the materiality of that, Mr. Wolosky? I don't understand it. What's material about that?

MR. WOLOSKY: The materiality is that we believe that Mr. Chappell had the same contract form.

THE COURT: Suppose he did?

MR. WOLOSKY: Your Honor, we know that when it came time for Mr. Chappell to leave his position as president of the company the defendants were very careful to get a written resignation, a written --

THE COURT: Come on, please. Aren't you lawyers going to conduct this trial within the rules? What difference does it make what the contract was with Mr. Chappell?

Q Mr. Gavin, do you know whether your employment contract was approved by the board of directors of Technical Tape, Inc.?

THE COURT: There is no issue about that,

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is there? Why are you spending time on it? The pleadings admit a contract was entered into.

No wonder you fellows have an idea that there is a prospect of a month's trial, which is utterly absurd. If you ask this type of question I can understand the time projection. There is no issue about this contract here. There is an issue as to whether or not it was terminated within the requirements of the contract.

Q Would you tell me, Mr. Gavin, what were your duties and responsibilities as executive vice president and chief operating officer of Technical Tape, Inc.?

THE COURT: Was he the executive vice president?

A Senior vice president.

Q Senior vice president.

A I was in complete charge of running the company on a day-to-day basis.

Q Who did you report to?

A The board of directors.

Q And did you in fact hire and fire other executives of the company?

A Yes.

Q And did you hire and fire one Don Moran?

1 rda Gavin-direct

2 A Yes.

3 Q And when did you hire Mr. Moran?

4 A Repeat the question. I'm sorry.

5 THE COURT: When did you hire Mr. Don
6 Moran?

7 THE WITNESS: Approximately July 15th or
8 thereabouts, 1971.

9 Q For what position did you hire Mr. Moran?

10 A Vice president of marketing for Tuck In-
11 dustries.

12 Q And at the time you hired Mr. Moran did
13 Tuck Industries have a vice president of marketing and
14 sales?

15 A Yes.

16 Q Who was that?

17 A Robert Jacobs.

18 Q And did you terminate Mr. Jacobs' employ-
19 ment?

20 A Yes.

21 Q Prior to your hiring of Mr. Moran did you
22 consult with the board of directors or Mr. Spravregen?

23 A No; just to tell him I was going to do it,
24 to discuss the termination pay.

25 Q Did you prior to terminating Mr. Jacobs

1 rda Gavin-direct

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2 consult the board of directors or Mr. Spravregen?

3 A No.

4 Q Did the board of directors ever complain
5 that they had not been consulted in the hiring of Mr.
6 Moran or the firing of Jacobs?

7 A No.

8 MR. PANISH: Objection, your Honor.

9 We don't know if he was present at all board meetings.

10 THE COURT: To his knowledge, as far as he
11 knows.

12 MR. WOLOSKY: To his knowledge.

13 Q To your knowledge, Mr. Gavin, did the board
14 of directors or Mr. Spravregen ever ask for a formal
15 review of the hiring of Moran and the firing of Jacobs?

16 A No.

17 Q After you hired Moran what were his duties
18 and responsibilities?

19 A He was responsible for the marketing efforts
20 of the domestic tape operation, Tuck Industries.

21 Q Who did Moran report to?

22 A To me.

23 Q Mr. Gavin, did there come a time when you
24 became president of Technical Tape?

25 A Yes.

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Q And when was that?

3

A April of 1972.

4

5

6

THE COURT: That was about a year after
you entered the employ of the defendant, is that cor-
rect?

7

THE WITNESS: Yes, your Honor.

8

9

Q At that time did you also become a director
of Technical Tape?

10

A Yes.

11

12

13

14

MR. WOLOSKY: Your Honor, I would offer
in evidence the minutes of the board of directors meet-
ing of April 4, 1972, at which Mr. Gavin was voted presi-
dent and a director.

15

THE COURT: Show it to the other side.

16

MR. WOLOSKY: Yes, your Honor.

17

(Pause.)

18

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MR. PANISH: Your Honor, I have no objec-
tion except with the exception that the last three
pages reference is made to another contract subsequent
to the date that these minutes were held, and actually
they do not form part of the minutes. I have no objec-
tion to the formal part which are part of the board
minutes, and all the board minutes but the last three
pages are not.

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1 THE COURT: What do they relate to?

2 MR. PANISH: To an April 21st letter
3 which couldn't have been part of the minutes which were
4 held on April 4, '72.

5 MR. WOLOSKY: Those were the minutes as
6 produced by the defendants.

7 THE COURT: We should only get evidence
8 that is relevant to the issues. The objection is
9 sustained. We will only receive the minutes of April
10 4, 1972.

11 MR. PANISH: Can we detach the other part,
12 your Honor?

13 THE COURT: Yes.

14 (Plaintiff's Exhibit 2 was received in
15 evidence.)

16 THE COURT: All right. That meeting
17 the plaintiff was elected the president of the company,
18 a director of the company, and made a member of the
19 executive committee of three, is that correct?

20 BY MR. WOLOSKY:

21 Q Is that correct, Mr. Gavin?

22 A Yes.

23 Q Mr. Gavin, at the time you became president
24 and a director of Technical Tape did you also receive
25

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Gavin-direct

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1 a salary increase?

2 A Yes.

3 Q What was your salary increased to?

4 A \$50,000 per year.

5 Q And did you also receive an incentive compen-
6 sation arrangement?

7 A Yes.

8 Q What was that arrangement?

9 A I was to receive 2-1/2 per cent of the
10 profit increase over the year 1951 -- I'm sorry -- '71
11 versus '72 and '73.

12 MR. WOLOSKY: I would offer as plain-
13 tiff's next exhibit in evidence the minutes of a board
14 of directors meeting of Technical Tape, Inc. held on April
15 25, 1972.

16 (Pause.)

17 MR. PANISH: Your Honor, this proffered
18 document is a nonexecuted copy of the board minutes
19 purporting to be that of April 25, 1972, but it was only
20 a draft and I have no objection.

21 THE COURT: It was only a what?

22 MR. PANISH: It was only a draft. I
23 have no objection to the entry of the board minutes of
24 that date, the ones that were signed by the chairman and
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1 taken by the secretary at that time, which is marked
2 Plaintiff's Exhibit 3 for identification on the deposi-
3 tion taken of the plaintiff on March 13, 1974.
4

5 (Plaintiff's Exhibit 3 was received in
6 evidence.)

7 THE COURT: These minutes of April 25,
8 1972 set forth or adopt the salary to be paid to the
9 plaintiff at \$50,000 a year and is the resolution that
10 refers to the arrangement that for the fiscal years
11 1972 and 1973 plaintiff be entitled to receive 2-1/2 per
12 cent of the increment of net income from operations,
13 exclusive of special items over net income from opera-
14 tions for the fiscal year 1971, and also granted an
15 option to the plaintiff to acquire 10,000 shares at
16 \$3.50 per share.

17 Is that correct?

18 BY MR. WOLOSKY:

19 Q Is that correct, Mr. Gavin?

20 A Yes, it is.

21 MR. WOLOSKY: I would offer as the next
22 exhibit in evidence Tuck Industries interoffice communi-
23 cation dated April 27, 1972.

24 (Pause.)

25 MR. PANISH: No objection, your Honor.

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(Plaintiff's Exhibit 4 was received in evidence.)

xx MR. WOLOSKY: Your Honor, I would offer as the next plaintiff's exhibit a notice of annual meeting and proxy statement dated June 28, 1972 of Technical Tape, Inc., and if there is no objection I would refer your Honor to the top of page 7 where it refers to Mr. Gavin.

(Pause.)

MR. PANISH: No objection, your Honor.

(Plaintiff's Exhibit 5 was received in evidence.)

BY MR. WOLOSKY:

Q Mr. Gavin, after you became a director until April 6, 1973 did you attend all board of directors meetings of Technical Tape, Inc.?

A Yes.

Q Mr. Gavin, to your knowledge, did the board of directors ever adopt any exclusions to the 2-1/2 per cent incentive formula referred to in the April 25th minutes?

A No.

MR. PANISH: I object to that, your Honor.

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1 THE COURT: On what ground?

2 MR. PANISH: He doesn't have the knowledge
3 as to all board meetings.

4 THE COURT: He said to his knowledge.
5 If the proof is otherwise you may develop it.

6 Overruled.

7 Q After the April, 1972, Mr. Gavin, did you in
8 fact receive your salary at the annual rate of \$50,000
9 a year?

10 A Yes.

11 Q When you became president and a director of
12 Technical Tape were there any changes in your duties
13 and responsibilities?

14 A No.

15 Q Were you still running the business on a
16 day-to-day basis?

17 A Yes.

18 Q And did you still report to the board of
19 directors?

20 A Yes.

21 Q Mr. Gavin, did there come a time when you
22 became dissatisfied with the performance of Mr. Moran?

23 A Yes.

24 Q And when was that?

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Gavin-direct

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A About December of 1972 it finally culminated.

3

Q Did you at that time speak to Mr. Sprayregen

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about Moran?

5

A Yes.

6

Q And where did you speak to him?

7

A In my office in New Rochelle.

8

Q And what at that time was said by you and

9

what was said by Mr. Sprayregen with respect to Moran?

10

A I told him I wanted to fire Moran because

11

it was a divisive force in the company. He was physically

12

irresponsible in my opinion, along with other areas

13

of dissatisfaction. And Mr. Sprayregen expressed sur-

14

prise, he thought we were getting along all right.

15

He suggested that I do him a favor and try

16

to work with Moran for 90 days to see if we couldn't

17

work this matter out, and reluctantly I agreed to do so.

18

Q Well, at that time did you tell Mr. Spray-

19

regen that Mr. Moran didn't get along with the other

20

executive officers?

21

MR. PANISH: Your Honor, he is leading him

22

on a conversation had with his own witness. I object

23

to it.

24

THE COURT: Yes.

25

Does that exhaust your recollection of what

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Gavin-direct

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was said? Was anything else said?

THE WITNESS: Aside from the fact that on the area of divisive force, I made mention specifically of the vice president of manufacturing who "hated" Moran.

Q At the time you met with Mr. Sprayregen in December of 1972 did you agree to wait 90 days as requested by Mr. Sprayregen?

THE COURT: The witness has already answered yes.

Q And did you in fact wait those 90 days?

A Yes.

Q And during those 90 days did you attempt to work out your problems with Mr. Moran?

A Yes.

Q And after your conversation with Mr. Sprayregen in December, 1972, when was the next time you had a conversation or discussion with Mr. Sprayregen or any other member of the board of directors regarding Moran?

A Early April, 1973.

Q And who did you have a conversation with at that time?

A Jerry Sprayregen.

Q And where did you have that conversation?

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A In New Rochelle.

Q And how was that conversation arranged, that meeting arranged?

A I called him and told him that I had something I wanted to discuss with him that I thought was important enough for him to stop by and talk to me about.

Q Did you call Mr. Sprayregen at his office in the Pan Am Building?

A Yes, I did.

Q Did he still maintain his office at Sprayregen & Company?

A Yes, he did.

Q Mr. Sprayregen came up that day to meet with you in New Rochelle?

A Yes, he did.

Q And did you have a conversation with him on that day?

A Yes, I did.

Q Can you tell me what was said by you and what was said by Mr. Sprayregen during the course of that conversation?

A I told him that nothing had changed in the intervening 90 days, that I had tried to work with Moran, that I found him impossible; I no longer felt that his

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1 attributes were greater than the liabilities to the
2 company and that I was going to terminate him.

3 He again expressed some surprise that we
4 couldn't get along and told me that since we had had the
5 good relationship for a long time he would like to have
6 me wait a couple of days so he could think about it,
7 and reluctantly again I granted him a few days for
8 courtesy.

9
10 Q During the course of that conversation with
11 Mr. Sprayregen did you in words or substance say that
12 you would resign --

13 MR. PANISH: Objection, your Honor.

14 THE COURT: Why are you leading him so
15 much? You are leading the witness.

16 MR. WOLOSKY: Your Honor, I believe that --
17 I am asking the witness if he said a particular thing.

18 THE COURT: You are leading the witness.

19 MR. WOLOSKY: I'm sorry, your Honor.

20 THE COURT: The witness is free to state
21 the full conversation. It seems to me he is an
22 intelligent person who understands the questions. Why
23 do you have to lead him?

24 Q Mr. Gavin, at this conversation with Mr.
25 Sprayregen was there any discussion about your resign-

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2 ing?

3 A No.

4 Q After this conversation with Mr. Sprayregen,
5 when was the next time you had a conversation or a
6 discussion with Mr. Sprayregen or any other member of the
7 board regarding Moran?

8 A I believe it was the following day I met with
9 Don Silvestri.

10 Q And where did you have a meeting or conver-
11 sation with Mr. Silvestri?

12 A At a restaurant in, I believe it was,
13 Larchmont. Larchmont or Mamaroneck, I'm not sure.

14 Q Did Mr. Silvestri have a position at that
15 time with Technical Tape?

16 A Yes.

17 Q What was his position?

18 A Vice president and a member of the board.

19 Q And apart from his position at Technical
20 Tape do you know whether he had any other association or
21 connection with Mr. Sprayregen?

22 A Yes. I believe he was associated with the
23 Stratton Group Limited as a board member, but I'm not
24 positive of that.

25 Q And could you tell me the substance of your

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conversation with Mr. Silvestri on that day?

A Basically, he advised me that he had been sent up by Jerry Sprayregen to see if he couldn't help work out the Moran matter, as it got to be called. We talked at great length, possibly two or two and a half hours, and discussed business philosophies generally, and at the end of the two and a half hours essentially told him I had not changed my mind, I still planned on firing Don Moran.

Q During the course of this conversation with Silvestri was there any discussion about your resigning?

A No, there was not.

Q After this conversation with Mr. Silvestri when was the next conversation or discussion you had with Mr. Sprayregen or any other member of the board of directors regarding Moran?

A I believe it was a Wednesday, which was also, I think, the next day, or possibly late that afternoon, when Mr. Sprayregen called me to ask me if I could attend a board of directors meeting on Friday morning.

Q Did he tell you what the subject matter of that meeting would be?

A No, he did not.

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A No, he did not.

Q During the course of that telephone conversation was there any discussion about your resigning?

A No, sir.

Q And did you attend that board meeting on Friday?

A Yes, I did.

Q And was the date of that meeting April 6th?

A I believe so.

Q That board meeting, was that the next conversation or discussion you had with the board of directors and Sprayregen regarding the Moran matter?

A Yes.

Q Could you tell me who was present at that board of directors meeting?

A Gerald Sprayregen, Herman Sprayregen, who was Gerry's father --

Q What was Mr. Herman Sprayregen's principal occupation or business?

A He was listed in the prospectus as a private investor, but I believe he also held a position and was on the board of Stratton Group Limited.

Q Can you tell me who else was present?

A Howard Weitz.

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Q Who is Mr. Weitz?

A Mr. Weitz was house counsel for Technical Tape and the Straton Group Limited.

Q Could you tell me who else was present?

A Dick Bernard, Richard Bernard.

Q And who is Mr. Bernard?

A He worked for Sprayregen Securities, I believe he ran the operation, if I am not mistaken.

Q And I take it you were present?

A Yes.

Q Were there any directors not present at that meeting?

A Yes.

Q Who were they?

A Don Silvestri and Mr. Robbins, Dr. Robbins.

Q Who is Mr. Robbins?

A He was a former college professor of Mr. Gerry Sprayregen. He was a professor when Gerry Sprayregen went to college, of whom he thought very highly.

Q Could you tell me what time that meeting started?

A I believe it was 8:30 in the morning. It was early.

THE COURT: When?

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THE WITNESS: 8:30.

THE COURT: In the morning?

THE WITNESS: Yes.

Q Could you tell me the substance of the discussion at that meeting.

A Basically, Gerry Sprayregen opened the meeting and he went into a speech about the Moran matter and indicated in the course of the conversation that I had said that if I did not have my way on this that I would resign if Moran was not fired. He got done with his speech and asked me if that was not essentially what the background had been.

I told him no, it had not been that way at all. He immediately got very, very angry, very angry, screamed and shouted at me.

At that point I advised him that I would prefer him to be quiet, which he did, and calmed down.

That was about that.

THE COURT: How long did the meeting last?

THE WITNESS: Well, I was there, your Honor, until about 2 o'clock, but the meeting did not last. If you would like me to elaborate further on that, I will.

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Q Would you, please.

A The essence of it when Mr. Sprayregen calmed down, I told him that I had not resigned and had no intention of resigning. This was followed by a great deal of conversation from the other board members. It appeared as though everyone were talking at once. And after a short while Mr. Sprayregen once again got very angry, angry enough to jump up from his chair and walk down the hall in his suite of offices, screaming at me to get out of the office.

I told him then that I was -- as far as I was concerned, I was still president and a director of this company and I was not going anywhere, that he'd have to put me out.

He was gone a very short while, possibly two minutes, and then came back into the room, asked the other people to leave, which they did. He said he wanted to talk to me privately. He closed the door and he said, "Look, as far as I'm concerned, you're through. Let's work out some kind of arrangement."

I said, "As far as I'm concerned, I've got an employment agreement. It speaks pretty much for itself. If you don't want me here, "I'm not going to stay, but as far as I'm concerned the agree-

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ment is in force and we have to talk."

We talked from about, I guess, 7 o'clock in the morning, 9:30 by that time, until approximately 2 o'clock. We didn't resolve anything, largely because a lot of the conversation had to do with a rehash of a lot of things that really weren't relevant to the problem at hand. And at approximately 2 o'clock I said, "Look, we are going nowhere." The settlements he wanted to make with me were totally unreasonable in my opinion, and I said, "As far as I'm concerned I'm leaving. I'm going to be in my office on Monday morning and that's that." And I left.

Q And after you left where did you go?

A I was exhausted, so I went home.

Q And on that Friday, after you left, did you have any further conversations with Mr. Sprayregen or any members of the board of directors?

A No.

Q Now, after Friday, April 6, 1973, when was the next time you had a conversation with Mr. Sprayregen or any other member of the board of directors of Technical Tape, Inc.?

A The following day, Saturday.

Q And who did you have a conversation with --

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1 THE COURT: Before you leave that, were
2
3 any resolutions passed at that meeting of the board of
4 directors?

5 THE WITNESS: Not to my knowledge, your
6 Honor.

7 MR. WOLOSKY: Your Honor, there are minutes
8 of those --

9 THE COURT: You say none was passed in your
10 presence?

11 THE WITNESS: Any motions?

12 THE COURT: Any resolutions.

13 THE WITNESS: There was a vote taken on whe-
14 ther or not Don Moran should be retained as a member --
15 in his position. I don't know if that's a resolution
16 or not, your Honor, but there was a vote taken and
17 everyone voted yes, except me. If that's the form in
18 which the question was put. I don't know if I voted
19 no to his staying or yes to his leaving.

20 THE COURT: Was there any resolution or
21 action taken in so far as your contract was concerned?

22 THE WITNESS: No, sir.

23 THE COURT: Or your employment by the
24 company?

25 THE WITNESS: No, sir. They were out

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Gavin-direct

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of the room.

BY MR. WOLOSKY:

Q Mr. Gavin, you said you had a conversation or more than one conversation on Saturday. With whom did you have a conversation or conversations on Saturday?

A With Gerry Sprayregen.

Q Did you have one or more than one conversation with Mr. Sprayregen on Saturday?

A I had two.

Q And at approximately what time was the first one?

A Around noon.

Q And was this a telephone conversation?

A Yes, he called me at home.

Q You were at home?

A Yes.

Q Could you tell me what was discussed between you and Mr. Sprayregen during the course of that telephone conversation?

A He called me because they were in the process of hiring a man named Walter Wolf, and it seems that Mr. Sprayregen had gotten some information which he felt didn't jibe with what Mr. Wolf had been telling

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2 us and asked me if I knew anything about it. I sug-
3 gested that it sounded to me as though the information
4 he had gotten was wrong, that I didn't believe that what-
5 ever it was relative to Wolf -- and I can't remember
6 exactly -- but whatever it was, I didn't think it was
7 as he was indicating, and that he should go ahead and hire
8 him.

9 Q During the course of that telephone conver-
10 sation was anything said by either you or Mr. Sprayregen
11 about the events of the preceding day?

12 A No.

13 Q Did Mr. Sprayregen call you again that
14 day?

15 A Yes.

16 Q What time did he make this second telephone
17 call to you?

18 A Approximately late afternoon, 5 o'clock,
19 6 o'clock.

20 Q Can you tell me what was discussed by you
21 and Mr. Sprayregen in that second telephone conversation
22 on Saturday?

23 A We discussed Walter Wolf again. Apparently
24 he had gotten more information. It jibed with what I
25 had said and it looked as though it was all right to go

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Gavin-direct

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1 ahead and hire him. That was the opening of the
2 conversation.
3

4 Before leaving or before hanging up he indicated
5 that he was still upset over the turn of events that
6 had come up the day before, and as far as he was concerned
7 all he wanted to do was see me come back to work. I
8 told him I had every intention of coming back to work
9 and would be in the office on Monday morning.

10 Q After these conversations with Mr. Spray-
11 regen on Saturday, when was the next time you had a
12 conversation with Mr. Sprayregen or any other members
13 of the board of directors?

14 A Sunday.

15 Q And who did you have a conversation with
16 on Sunday?

17 A Mr. Gerry Sprayregen.

18 Q Did you have one or more than one conversation
19 on Sunday with Mr. Sprayregen?

20 A I had one conversation but he had called
21 repeatedly during the day, I was not in and my daughter
22 was taking messages. He must have called several
23 times. He did call several times. And the last
24 thing he told my daughter was to leave a message that
25 regardless of what time I came home I was to call him

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at his home.

Q Did you call him at his home?

A Yes, I did.

Q At what time?

A It was late; 11, 11:30 possibly.

Q Could you tell me the substance of your conversation with Mr. Sprayregen at that time?

A Yes. He answered the phone and said, "John, I want to read you a letter. You will be receiving a copy of it." And he read me a letter which in substance said that the board of directors had accepted my resignation as president, chief operating officer and director of the company and that he would be meeting with me on Monday to try to resolve the issue, or words to that effect.

THE COURT: What did you say?

THE WITNESS: I said that as far as I was concerned I was still the president and chief operating officer and director of the firm, since I had an employment agreement to that effect, and that I would be in the office Monday morning.

THE COURT: Did you appear Monday morning?

THE WITNESS: Yes, sir.

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2 THE COURT: We will take our midmorning
3 recess.

4 (Recess.)

5 BY MR. WOLOSKY:

6 Q Mr. Gavin, did you ultimately receive a copy
7 of the letter that Mr. Sprayregen read to you that Sunday
8 night?

9 A Yes.

10 MR. WOLOSKY: May I have this marked for
11 identification, please.

12 (Plaintiff's Exhibit 6 was marked for iden-
13 tification.)

14 Q I show you Plaintiff's Exhibit 6 for identi-
15 fication and I ask you whether that is a copy of the let-
16 ter read to you and which you received in evidence.

17 A Yes.

18 MR. WOLOSKY: I would offer this letter
19 in evidence.

20 MR. PANISH: No objection, your Honor.

21 (Plaintiff's Exhibit 6 was received in evi-
22 dence.)

23 Q Mr. Gavin, did you respond to Plaintiff's
24 Exhibit 6?

25 A Yes.

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MR. WOLOSKY: May I have this marked
as Exhibit 7 for identification, please.

(Plaintiff's Exhibit 7 was marked for identification.)

Q I show you Plaintiff's Exhibit 7 for identification and I ask you whether that is your response to the letter written to you by Mr. Sprayregen.

A Yes.

MR. WOLOSKY: I would offer this in evidence.

(Pause.)

MR. PANISH: No objection.

(Plaintiff's Exhibit 7 was received in evidence.)

THE COURT: All right.

Q Mr. Gavin, did you report to work on Monday, April 9, 1973?

A Yes.

Q What time did you report to work?

A Approximately 8 o'clock.

Q When you arrived at your office on that day what, if anything, did you observe?

A I observed my belongings packed in boxes and sitting out in the hall, and Mr. Spravregen standing in

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1 my office.

2 Q Did you have a conversation with Mr. Sprayregen
3 at that time?

4 A Yes, I did.

5 Q And could you tell me what was said by you
6 and what was said by Mr. Sprayregen during the course
7 of that conversation?

8 A I told Mr. Sprayregen that he couldn't even
9 be decent about letting me go with a little dignity,
10 what with my stuff being piled out in the hall.

11 He said, "As far as I'm concerned, you're
12 through. Now let's sit down and talk about it."

13 Q Mr. Gavin, when you reported to work on
14 April 9, 1973, were you ready and willing to continue
15 performing your services as president and chief operating
16 officer of Technical Tape, Inc.?

17 A Yes.

18 Q And were you ready and willing on that date
19 to continue performing your services under your employ-
20 ment contract with the defendants?

21 A Yes.

22 Q And were you permitted to do so by Mr.
23 Sprayregen?

24 A No.

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Q Now, until the morning of April 9, 1973 had you faithfully performed your duties under your employment contract?

MR. PANISH: Objection, your Honor.

THE COURT: Leave out "faithfully."

Q Mr. Gavin, until the morning of April 9, 1973 had you performed your duties under your employment contract with the defendants?

A To the best of my ability, yes.

Q From the time you commenced your employment with the defendants in April, 1971 until April 9, 1973, apart from the controversy over Mr. Moran, had Mr. Sprayregen or any other members of the board of directors made any complaints to you or to your knowledge about your performance as chief operating officer?

A No.

Q Mr. Gavin, did you ever orally or in writing resign your position with defendants?

A Absolutely not.

Q Mr. Gavin, did you ever orally or in writing consent to a termination of your employment contract?

A No, sir.

Q Mr. Gavin, to your knowledge, had any director of Technical Tape orally resigned his position?

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A Not to my knowledge.

Q Mr. Gavin, to your knowledge, had any executive officer of Technical Tape orally resigned his position?

A Not to my knowledge.

Q Mr. Gavin, did you ever receive the \$35,000 severance pay called for by your contract?

MR. PANISH: Objection, your Honor.

There is no foundation for that.

THE COURT: Why not? There is a foundation but there is another question. Why do you say there is no foundation? The man's employment was terminated before the period fixed under the contract and there is specific provision for the payment of severance pay. Why do you say there is no foundation?

MR. PANISH: It depends on how the termination took place.

THE COURT: I will allow the question.

A No, I did not receive the \$35,000 severance.

THE COURT: While you are on that subject, are you claiming you are entitled both to the salary or the balance of the period of the contract and the severance pay?

MR. WOLOSKY: Your Honor, we have found no

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1 limitation in the contract and we would at this point
2 urge that the plaintiff is entitled to the severance
3 pay as a matter of law and also that he is entitled to
4 \$50,000 for the salary under his contract.
5

6 THE COURT: Do I understand you correctly
7 that if I should find that the plaintiff is entitled to
8 salary for the balance of the term of the contract, that
9 in addition he is entitled to severance pay? Will
10 you show me the clause in the contract that justifies
11 that position?

12 MR. WOLOSKY: Your Honor, under the contract --

13 THE COURT: What is the clause you are re-
14 ferring to and how does it read?

15 MR. WOLOSKY: That's paragraph 2. It
16 says:

17 "Should the company at any time from April
18 5, 1971 to April 5, 1974 terminate Gavin's employment
19 for any reason whatsoever, including but not limited to
20 Gavin's inability to perform, merger, dissolution or sale
21 of stock or assets of the company, Gavin will receive
22 severance pay in the amount of \$35,000 per annum, payable
23 in equal monthly installments at the end of each month
24 until April 5, 1974."

25 THE COURT: And you read that to mean

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severance pay in addition to the salary?

MR. WOLOSKY: Your Honor, there is nothing in the contract --

THE COURT: Put the next question, please.
BY MR. WOLOSKY:

Q Mr. Gavin, did you ever receive, after April 9, 1973, the balance of your annual salary of \$50,000 until the termination date of your contract?

MR. PANISH: Objection, your Honor.

THE COURT: On what ground?

MR. PANISH: I think he already elected to proceed on severance pay. He is now going into damages for wrongful discharge. I think they are both mutually exclusive.

THE COURT: Your responses are about as meaningful as your adversary's responses. Objection overruled. I am simply indicating that the court is of the view he can't have both. He certainly is suing for the balance of the salary.

What is the amount that is computed to be the balance of the salary, that is, from the date of April 9th to the expiration date of the contract?

MR. WOLOSKY: A year left, your Honor.

THE COURT: Is it \$50,000?

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1 MR. WOLOSKY: \$50,000. What we are doing,
2 your Honor, is we are putting in both aspects of the
3 damage question and we will leave it for your Honor to
4 decide which.
5

6 THE COURT: I don't have much difficulty
7 in deciding it despitewhat you said a moment ago, assum-
8 ing plaintiff is entitled to recovery.

9 MR. WOLOSKY: I would offer in evidence --

10 THE COURT: Now, is there any evidence
11 as to what this percentage comes to?

12 MR. WOLOSKY: That's what I am doing right
13 now.

14 I would offer in evidence Technical Tape
15 annual report for 1971.

16 THE COURT: That's the base period, is
17 that correct?

18 MR. WOLOSKY: Right.

19 THE COURT: And 2-1/2 per cent is computed
20 on that period, that is, the 2-1/2 per cent in the follow-
21 ing year?

22 MR. WOLOSKY: Yes, your Honor.

23 THE COURT: Is that correct?

24 THE WITNESS: Yes.

25 THE COURT: And for the succeeding year?

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1 THE WITNESS: Yes, your Honor.

2 THE COURT: Of course, it seems to me
3 that that item could have been stipulated by counsel
4 without making any concession of liability. Simply to
5 have agreed upon the figures. I would assume the
6 extensive depositions before trial that were had in this
7 matter some judgment could have been arrived at.

8 MR. PANISH: Your Honor, may I respectfully
9 point out that the defendants --

10 THE COURT: You may respectfully point
11 out anything you think is relevant.

12 MR. PANISH: That the figures in these annual
13 reports, your Honor, do not contain the agreement be-
14 tween the parties. That in the board minutes re-
15 specting the 2-1/2 per cent increment of the '72-73 fiscal
16 years over 1971 there were certain exclusions.

17 THE COURT: I indicated to you that you
18 would be in a position to present the exclusions,
19 if in fact they are required to be excluded.

20 MR. PANISH: I have no objection to the
21 '71 annual report, your Honor.

22 (Plaintiff's Exhibit 8 was received in
23 evidence.)

24 THE COURT: What is the figure that you have?

XX

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Gavin-direct

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Now, are you expecting me to compute this? This is something that should have been done. This is exactly one of the reasons why we have pretrial procedure. Have you computed the 2-1/2 per cent that you claim, and I am asking has your adversary set up the exclusions that he claims?

Well, I am not going to spend time at this point going over this now. I would assume that you would come in with your figures. Don't you have them?

MR. WOLOSKY: We would be claiming approximately \$7000.

THE COURT: Well, approximately --

MR. WOLOSKY: I believe Mr. Gavin has figured it out.

Haven't you, Mr. Gavin?

THE WITNESS: I believe it was in the original filing that we made.

THE COURT: Mr. Wolosky, it isn't what he believes, it isn't what you believe. You have been at this case for several years and I assumed you knew what the contentions were. This should have been pinpointed exactly. I shouldn't be sitting here now trying to formulate what the percentage is.

MR. PANISH: I am prepared on the exclusions,

1 rda

Gavin-direct

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2 your Honor.

3 THE COURT: What is the per cent though first
4 before you come to the exclusions? What does it come
5 to?

6 MR. WOLOSKY: If you will give me two
7 minutes, your Honor.

8 THE COURT: We will reserve that. Finish
9 your examination with the witness.

10 MR. WOLOSKY: I would offer the Technical
11 Tape annual report for 1972 as the next plaintiff's
12 exhibit.

13 THE COURT: Continue with the examination
14 and see if you gentlemen can't sit down and agree
15 what the figures are.

16 MR. PANISH: Your Honor, I have no objection
17 to this '72 report.

18 (Plaintiff's Exhibit 9 was received in
19 evidence.)

xx 20 THE COURT: Won't you please continue.

21 BY MR. WOLOSKY:

22 Q Mr. Gavin, did you ever receive 2-1/2 per cent
23 of the increment of Technical Tape's net income of '72
24 over 1971?

25 A No.

rda

Gavin-direct-cross

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MR. WOLOSKY: Your Honor, subject to giving you that figure I would have no further questions of the witness.

THE COURT: All right, you may inquire.

CROSS EXAMINATION

BY MR. PANISH:

Q Mr. Gavin, prior to the time that you signed this agreement, Plaintiff's Exhibit 1, the one dated April 5, 1971, you read it, did you not, sir?

THE COURT: You what?

Q You read it, did you not, sir?

A Yes.

Q Now, I point out to you, if I may, paragraph No. 5. Will you be good enough to read that to yourself at this time.

(Witness reads document.)

Q Now, it makes reference there that all prior agreements are superseded; do you see that, sir?

A Yes.

Q And then it also makes an exception with respect to an agreement referred to as confidential information and trade secrets.

A Right.

Q I ask you at this time whether at the time

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Gavin-cross

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1 rda
2 you executed this agreement you asked Mr. Chappell, the
3 president, to show you a copy of the agreement referred
4 to in the exception?

5 A No, I did not.

6 Q Did you think it was important?

7 A Important enough for me to have gone on
8 record any number of times that there was no way that I
9 would sign any agreement restricting my activities after
10 I left Technical Tape. I would not sign a no compete
11 agreement is what I'm saying.

12 THE COURT: What agreement?

13 THE WITNESS: A no competing agreement.

14 Q You were in the tape business for several
15 years prior to this employment, were you not?

16 A Yes.

17 Q And weren't you aware of the fact that there
18 are certain business matters in this type of business
19 that are confidential?

20 MR. WOLOSKY: I'm going to object, your
21 Honor. There is no foundation for that question.
22 I am going to object to this line of questioning unless
23 the defendants have and can produce a trade secrecy agree-
24 ment or a noncompete agreement signed by the plaintiff.

25 THE COURT: I will allow the question.

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Gavin-cross

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Q You may answer, sir.

3

A I am sorry, I didn't get the question.

4

Q Weren't you aware of the fact that in this

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business there were many things considered to be confi-

6

dential to management?

7

A I didn't think so.

8

Q Beg your pardon?

9

A I didn't think so.

10

Q Well, this business depended a great deal upon

11

price list, did it not?

12

A To the extent that the price list is import-

13

ant in terms of telling your sales force what price you

14

want to sell your product for.

15

Q Wasn't it important that other salesmen

16

from other companies did not know the precise price list

17

of your company or the defendant?

18

A Oh, but they did.

19

Q Who did?

20

A Any competitive salesman that was any good

21

would get a price list of his major competitors.

22

Q Are you saying that they can -- all the

23

price lists put out by this defendant?

24

A Yes.

25

Q Did you ever hear of a TOP distributor price

rda Gavin-cross

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list?

A Yes, I did.

Q Was that a price list put out by this defendant?

A Yes, it was.

Q What does "TOP" stand for?

A Talk opportunity program.

Q What type of program is that?

A Basically it's a marketing program.

Q How many distributors did it contain while you were employed for the defendant?

A How many distributors did the defendant have when I was employed?

Q The TOP.

A The TOP distributors?

Q Yes.

A My guess would be in the area of 250, maybe, 200. I don't remember.

Q And weren't you aware of the fact as president of the company that prior to that, as senior vice president and chief operating officer, that that price list was contained only within certain personnel of this defendant?

A You are mistaken.

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Gavin-cross

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1 MR. WOLOSKY: I object to the form of that
2
3 question.

4 THE COURT: He has answered. The answer
5 is no, he wasn't aware of it.

6 Is that correct? That wasn't the fact?

7 THE WITNESS: It's not a fact, right.

8 Q Now, despite the wording contained in the
9 latter part of paragraph 5, which I referred to, which
10 you called a noncompete agreement, did you insist to Mr.
11 Chappell that that language be deleted?

12 A No.

13 Q Did you sign such an agreement?

14 A No, never.

15 Q Did anyone in an executive position sign
16 such an agreement to your knowledge during your tenure?

17 MR. WOLOSKY: Objection. Irrelevant.

18 THE COURT: What difference does it make
19 if somebody else did sign such an agreement? We are
20 dealing with this plaintiffs' claim and his agreement
21 with the defendants.

22 Q Have you ever seen such an agreement put out
23 by the defendant?

24 MR. WOLOSKY: Objection, your Honor.

25 THE COURT: Objection sustained.

rda

Gavin-cross

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1 Q Now, Mr. Gavin, do you recall that this
2
3 agreement, Plaintiff's Exhibit 1, sets forth that you
4 were to receive your salary in equal monthly installments?

5 A I just have to check. I don't know if that's
6 it.

7 Q Paragraph No. 2 I refer you to.

8 (Witness reads document.)

9 A Yes, I see that.

10 Q How were you paid from the time you were
11 employed under this agreement?

12 A Weekly.

13 Q And did that continue from April of 1971
14 until April of 1973?

15 A Yes.

16 Q The fact is it was never monthly, isn't that
17 so?

18 A That's right. I wanted to change it to
19 at least semimonthly.

20 Q But it was never changed?

21 A That's right.

22 Q And you received your salary weekly?

23 A Yes.

24 Q In connection with your receiving your salary
25 weekly, Mr. Gavin, did you execute any agreement between

rda

Gavin-cross

65

1 yourself and the defendant to show that change in this
2 agreement, Plaintiff's Exhibit 1 in evidence?

3
4 A I don't understand the question.

5 Q I will try to rephrase it then.

6 From the time you started to receive your
7 salary, from April, '71 through April, '73, did you and
8 the defendant enter into any written agreement showing
9 the change of you receiving a salary on a weekly basis
10 instead of a monthly basis?

11 MR. WOLOSKY: I am going to object to that,
12 your Honor, on the grounds of relevancy and materiality.

13 THE COURT: Overruled.

14 A No, I did not.

15 MR. WOLOSKY: Your Honor, I would assume
16 in the last question the defendant was excluding from
17 that the regular weekly checks that the witness en-
18 dorsed, if that was the case.

19 THE COURT: I don't understand your state-
20 ment at all.

21 MR. PANISH: I don't either, your Honor.

22 THE COURT: What do you mean by that, Mr.
23 Wolosky?

24 MR. WOLOSKY: As I see it, your Honor, plain-
25 tiff, if the defendant is attempting to argue that there
was nothing in writing agreeing to --

1 rda

Gavin-cross

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2 THE COURT: That's right.

3 MR. WOLOSKY: I would submit if the
4 plaintiff was paid weekly and the check signed by the
5 defendant and endorsed by the plaintiff, that that
6 would constitute a writing sufficient to --

7 THE COURT: That's a matter of argument.
8 Why is that an objection to his question? That's
9 his contention, that there was a modification in the
10 agreement without a writing.

11 Q Mr. Gavin, initially when you were employed
12 under the written agreement your salary was fixed at
13 \$35,000 per annum and that's the amount you received
14 until such time that an increase was made?

15 A Yes.

16 Q And there came a time in 1972 when your
17 salary was increased to \$50,000, do you recall that?

18 A Yes.

19 Q Now, that increase in salary wherein the
20 April 5, '71 agreement was changed was never memorialized
21 in a document signed by you and the defendant, isn't
22 that so?

23 MR. WOLOSKY: I am going to object, your
24 Honor, on the grounds that the document doesn't have
25 to be signed by the plaintiff.

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Gavin-cross

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1 rda
2 THE COURT: Sustained as to form, not on
3 the ground that you assert.

4 Q Did you and the defendant execute a docu-
5 ment or an agreement for the increase in your salary
6 to \$50,000?

7 MR. WOLOSKY: I would note my objection
8 on the same grounds, your Honor.

9 THE COURT: Objection overruled.

10 A It was increased to \$50,000 at a board
11 meeting and so noted.

12 Q But you never actually signed a document
13 to that effect together with the defendant? Don't you
14 agree with that, sir?

15 A I'm not sure. I may have sent a memo to
16 payroll or something indicating that that had been
17 done and, you know, that my salary should change
18 accordingly.

19 THE COURT: You didn't sign a formal agree-
20 ment saying that you and the defendant agreed that
21 the salary should be increased from 35 to 50 thousand
22 dollars?

23 THE WITNESS: No, sir.

24 THE COURT: Put your next question, will
25 you, please.

rda

Gavin-cross

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Q I want you to look again at Plaintiff's Exhibit 1. Does that make any reference to the fact that you, your family, were to be covered by medical insurance of any kind?

A I don't see any.

Q Now, isn't it a fact, Mr. Gavin, that a certain letter was then written in by the then president, Mr. Chappell, to a Mrs. Morfus who took of the payments to the effect that you would be covered by medical insurance? And I show you this to refresh your recollection (handing).

A Yes.

Q And were you in fact covered by the insurance, you and your family?

A Yes.

MR. PANISH: I offer this in evidence, please.

(Pause.)

MR. WOLOSKY: No objection, your Honor.

(Defendants' Exhibit A was received in evidence.)

THE COURT: Mr. Panish, I want to understand this, to make sure I understand what your position is. This memo reads:

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Gavin-cross

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1 rda
2 "As part of the employment agreement with
3 Mr. John A. Gavin, the company agreed to pay all of
4 his medical insurance costs. Therefore, please
5 do not withhold anything from medical insurance."

6 Now, are you arguing now or is it your sug-
7 gestion that there had to be a separate writing
8 consenting to this, otherwise there is a modification
9 of the contract?

10 MR. PANISH: No. That certain modifi-
11 cations took place beyond the contract --

12 THE COURT: This states that this comes
13 within the purview of the contract, doesn't it?

14 MR. PANISH: He only made reference to
15 it at that time. It was not part of the original
16 contract. It was a modification of the contract. My
17 argument is, your Honor, that many modifications took
18 place which were not executed by the parties as the
19 plaintiff argues.

20 THE COURT: I understand what you are
21 saying. You are saying if a company decided at
22 the end of the year to give a bonus to employees,
23 and an employment agreement is in writing, this is
24 a modification and an employee had to sign a separate
25 agreement consenting to receive the bonus. If one

rda

Gavin-cross

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1 is to receive an increase, one who had an employment
2 agreement in writing, the employee had to consent to
3 obtain the increase.
4

5 Not that they had to consent, that they
6 got the bonus even without a writing. If the company
7 decided to give them a bonus it was given to the employee
8 without any type of writing executed by the employee
9 without consenting to it.

10 THE COURT: In consequence what is the
11 result?

12 MR. PANISH: The result is, your Honor,
13 that this agreement, notwithstanding the fact that
14 it states that there must be a writing signed by
15 both parties for a modification, many modifications
16 took place without a writing signed by both parties,
17 of which this was one in a series of numerous things
18 that occurred, including the termination.

19 MR. WOLOSKY: May I be heard on that
20 at this time, your Honor.

21 THE COURT: Not at this time.

22 Please move along. Put your next ques-
23 tion.

24 BY MR. PANISH:

25 Q Mr. Gavin, in your prior employment with

rda

Gavin-cross

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the other type companies, you mentioned Mystic Tape as one of them, you stated that you were chiefly responsible for sales, is that correct?

A Yes.

Q Were you ever responsible for research and development?

A No.

Q Were you responsible for marketing?

A Yes.

Q Responsible for manufacturing?

A No.

Q This defendant had several plants, did it not?

A Yes.

Q And the office in which you performed your duties was located in New Rochelle?

A Yes.

Q And that office contained a research and development section, did it not?

A Yes.

Q There was no actual manufacturing done there, is that so?

A There was some limited manufacturing.

Q Very limited?

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A Verv limited.

Q It had several other plants?

A Yes.

Q It had one in Beacon, New York?

A Yes.

Q And Beacon, New York employed several hundred people did it not?

A Seven hundred?

Q Several hundred people.

A Yes.

Q How many people did it employ?

A My guess would be 450.

Q And from New Rochelle to Beacon in mileage was about how much, sir?

A Oh, 60, 75 miles.

Q You had occasion to go there in the performance of your duties?

A Yes.

Q And you went there by automobile?

A Yes.

Q And how long did it take you, about?

A Oh, an hour and 10 minutes, hour and 15 minutes, thereabouts.

Q And starting, say, in April of '71 from the

rda

Gavin-cross

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time you were employed to the end of that year, calendar year '71, how many times did you go to Beacon, New York?

A In that year probably five or six.

Q How much time did you spend there?

A Generally, the better part of a day, say 10 o'clock until 3 or 4, thereabouts.

Q Then you left?

A Yes.

Q And how many times did you attend there in 1972?

A I'd say probably the same number.

Q Did they have any problems in manufacturing there at times?

A Yes.

Q Did that happen on numerous occasions?

A Did what happen?

Q The problems that arose there.

MR.WOLOSKY: I'm going to object, your Honor, to the form.

THE COURT: I don't know what this is leading to but I'll allow it for the time being.

Q Did they have problems?

A There are always problems in a manufacturing plant.

rda

Gavin-cross

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Q Some major and some inconsequential, is that correct?

A Yes.

Q And in 1973 until the time you mentioned in April how many times did you go there, if at all?

A I really don't recall if I went at all. I may have, I may not.

Q Did the defendant also have a plant in Carbondale, Illinois?

A Yes.

Q And they did manufacturing there?

A Yes.

Q How many employees were there?

THE COURT: Mr. Panish, what does that have to do with this case? What is the relevancy?

MR. PANISH: To show this plaintiff failed to perform properly as part of my defense.

THE COURT: Does it make a difference how many employees were there?

MR. PANISH: I think it would.

THE COURT: All right, go ahead.

A Approximately 300, three to four hundred.

Q How many times in the two years, from April, 71 to April of '73, did you visit the Carbondale plant?

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Gavin-cross

75

1 rda
2 A I would guess approximately seven or eight
3 times.

4 Q And how much time did you spend there each
5 time?

6 A Generally I would arrive in St. Louis the
7 night before and then take a plane over to Carbondale
8 and come in the next morning and leave approximately
9 3 o'clock.

10 Q And was there also a plant located in Canada?

11 A Yes.

12 Q What city was that?

13 A Cornwall, Ontario, Canada.

14 Q Did you attend there?

15 A Yes.

16 Q How many times?

17 A Ten, 12, maybe. I don't know.

18 Q As president of the company you had a lot
19 to say concerning management or submanagement at those
20 plants, did you not?

21 A Yes.

22 Q And did you feel that by your attendance there
23 at Carbondale, Beacon and Canada you spent sufficient
24 time at those plants during your performance?

25 A Yes.

rda

Gavin-cross

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Q You felt it was not necessary to go there more often than you testified to, is that correct?

A No.

Q And the New Rochelle office where you were was just actually an executive office, except for the small portion you mentioned for research and very little manufacturing?

A Yes.

Q It was chiefly executive, is that right?

A Sales, customer service. It was the headquarters for the company, not just executive.

Q Now, in April of 1971 you were chiefly responsible for what in connection with the defendant company? What phases of the operation?

A Well, functionally my strength was marketing. That was where they were having their biggest problems. That's where I placed my first emphasis because I thought it was most important.

Q And you were aware of the fact that the then president, Mr. Chappell, sent a memorandum to all personnel concerning your duties?

A I don't remember.

Q Well, if I show you this paper dated April 13, 1971, see if it refreshes your recollection as to

rda

Gavin Cross

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the document or paper or letter that was circulated from the then president to personnel of the defendant showing what your duties would be.

MR. WOLOSKY: I'm a little unclear as to what recollection the witness is to be refreshed on, whether he saw that document before or whether he has any knowledge of the truth of the facts in the document.

THE COURT: He asked whether he had seen it before.

A Yes, I believe I did see it.

Q It relates mainly to marketing and manufacturing, does it not?

MR. WOLOSKY: I am going to object to testimony as to the document unless it's in evidence.

THE COURT: Objection sustained.

MR. PANISH: I offer it in evidence.

MR. WOLOSKY: May I see it?

MR. PANISH: Yes (handing).

MR. WOLOSKY: I am going to object, your Honor. It is hearsay.

THE COURT: I don't know why you are objecting. Why are you objecting? It's hearsay.

MR. WOLOSKY: I don't want the witness

rda

Gavin-cross

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to be limited in those duties.

THE COURT: It is hearsay and the court will treat it accordingly under the doctrine of the court sitting on a nonjury case, using its judgment in taking into account only relevant material.

(Defendants' Exhibit B is received in evidence.)

THE COURT: Put your next question to the witness.

BY MR. PANISH:

Q Now, there came a time, Mr. Gavin, at a board meeting held on April 30, 1971 -- do you recall that?

A Yes.

Q And during that meeting you were nominated to be senior vice president, chief operating officer, do you recall that?

A Yes.

Q And isn't it a fact that you also were elected to be an assistant secretary of this defendant?

A Not to my knowledge, no.

Q Now, I show you a copy of the board minutes of April 30, 1971 and direct your attention to page 2, please. A little above the center of the page, do you

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Gavin-cross

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see your name, sir?

A Yes.

Q Do you see the nominations next to your name senior vice president, chief operating officer?

A Yes.

Q It also states assistant secretary?

MR. WOLOSKY: I am going to object to reading the document unless it's in evidence.

THE COURT: Sustained.

Q Did you know Andrew Hiene at that time?

A I met him.

Q Was he a member of the board?

A I believe he was, yes.

Q Look at the fourth page from the last on these minutes.

Now, he was secretary at that meeting. Do you recall him being secretary?

MR. WOLOSKY: Your Honor, I am going to object to counsel reading in what's in the minutes unless they are in evidence.

THE COURT: Objection sustained.

Q You say at this time, Mr. Gavin, you don't recall that you were nominated and then elected to be an assistant secretary of this company?

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Gavin-cross

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2

A Am I saying I don't remember.

3

Q I'm asking you, sir, do you or do you not remember?

4

5

A I do not remember.

6

Q At that time you were senior vice president, is that so?

7

8

A Yes.

9

Q And you were chief operating officer?

10

A Yes.

11

Q And you had access to the board minutes?

12

A No.

13

Q You weren't able to read the board minutes?

14

A I wasn't a board member.

15

Q But did you ever read the board minutes, sir?

16

17

A I never got a copy of them, no.

18

Q Could you have read them if you wished to?

19

THE COURT: What's the relevance of that? Come on, please, move along. We are wasting time. Get down to the issues in the case, will you.

21

22

MR. PANISH: I am pointing out --

23

THE COURT: Put your next question. No wonder there is a proposal for rules on admission of attorneys in this court.

24

25

rda

Gavin-cross

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Q Mr. Gavin, were you familiar with the stock option plan that this defendant had?

A Yes.

Q And isn't it so that you received an option to purchase 30,000 shares of common stock of the company at \$3.50 per share?

A Yes.

Q And I show you this page entitled "Stock Option Plan," with a signature of the then president, Edward Chappell. And it makes reference to your name and the number of shares.

A Yes.

MR. PANISH: I offer that in evidence, your Honor.

(Pause.)

MR. WOLOSKY: No objection, your Honor.

(Defendants' Exhibit C was received in evidence.)

THE COURT: Proceed, please.

Q Mr. Gavin, there came a time in 1972 when you received a bonus of \$8000 from this defendant?

A Yes.

Q And at the time of your receipt of it or even prior to it you never executed any document modifying your

1 rda

Gavin-cross

2 April, '71 written agreement in respect to that bonus,
3 isn't that a fact?

4 A Not that I remember.

5 Q You have no such document?

6 A I don't have one, no.

7 Q And did there also come a time, I believe
8 in April of 1972, that you received a bonus in the sum
9 of \$2000 from the defendant?

10 A Yes.

11 Q And also similarly in respect to that you
12 executed no document with the defendant modifying
13 your April, '71 written agreement, Plaintiff's 1 in evi-
14 dence?

15 A No.

16 Q It is a fact, is it not?

17 A Yes, it's a fact.

18 Q And you received the checks in connection
19 with that and you endorsed them, isn't that so?

20 A Yes.

21 Q Now, Mr. Gavin, you made reference to what
22 you call a 2-1/2 per cent increment of net income upon
23 which you are seeking damages in this court; do you re-
24 call that?

25 A Yes.

1 rda

Gavin-cross

2 Q And that took place, that proposal took place,
3 at a board meeting, did it not, sir?

4 A Yes.

5 Q And at that board meeting, or even prior to
6 the board meeting or subsequent to the meeting, you
7 signed no written documents with the defendant concerning
8 that increase, did you, sir?

9 A No.

10 Q And are you aware of the fact, are you not,
11 that during that board meeting in which this proposal
12 was made the resolution also set forth that it was sub-
13 ject to certain limitations and exclusions as may be
14 determined later by the board, do you recall that?

15 A No.

16 Q I show you these minutes of April 25, 1972,
17 Plaintiff's Exhibit 3 in evidence, which your attorney
18 offered, on page 3, about there (indicating).

19 A Right.

20 Q You were aware of that proposal, that
21 resolution, being made by the board, were you not?

22 A Not as it states here.

23 Q Not as it states there?

24 A No.

25 Q You mean you are aware of another resolution?

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Gavin-cross

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1 A No. I'm aware that these minutes came
2
3 to my attention for the first time some time in either
4 late March -- I'm sorry, late February or early March
5 of 1973. The meeting was held on April 25, 1972.

6 Q What was your position on that date?

7 A When I got the minutes I read it --

8 Q What was your position on April 25, 1972?

9 A I was president and chief operating officer
10 and director.

11 Q And as president of this company did you
12 ever ask to see those minutes?

13 A Repeatedly.

14 Q I see. You are saying now, notwithstand-
15 ing the fact that your attorney offered this in evidence,
16 that these minutes do not reflect the resolution that
17 was passed?

18 A I am telling you that I repeatedly saw the
19 copies of the minutes, not so much for what it contained,
20 as for the fact that the auditors were getting very up-
21 set that they weren't available. Consequently, when
22 it came, almost a year after the fact, I read the para-
23 graph. . . There was not much I could do about it obviously.
24 That's what it said. But I didn't agree with it and
25 I told Mr. Sprayregen.

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Gavin-cross

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1 rda
2 THE COURT: What are you referring to,
3 that that's what it said and there wasn't much you
4 could do about it? What portion are you referring
5 to?

6 THE WITNESS: I am referring to the part
7 where it says: "Mr. Gavin will be entitled to receive
8 2-1/2 per cent of net income," et cetera. Also, "It
9 was the consensus of the board that Mr. Gavin's per-
10 centage be subject to limitations based upon the
11 earnings of the acquired companies and to certain other
12 exclusions as may later be determined by the board of
13 directors."

14 THE COURT: That the part you say --

15 THE WITNESS: That I objected to, yes.
16 But unfortunately it was a year later --

17 THE COURT: It was discussed at the meet-
18 ing?

19 THE WITNESS: No, sir. I don't recall
20 that was ever discussed at the meeting with respect to
21 exclusions or any of that sort.

22 THE COURT: All right.

23 BY MR. PANISH:

24 Q Did you keep any written memoranda of what
25 took place at this meeting, Mr. Gavin?

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1
2 A No.

3 Q So from the time the meeting was held on
4 April 25th to the first time you saw it, which you
5 said was at the beginning of 1973, you had no reason
6 or reference or anything to refresh your recollection
7 between that time, isn't that a fact?

8 A Mr. Panish, when you are dealing with 2-1/2
9 per cent of what could be hundreds of thousands or
10 millions, hypothetically, of dollars I needed nothing
11 more than to know that I was getting 2-1/2 per cent on
12 the incremental increase. I didn't need a note to tell
13 me that.

14 Q You had nothing to make reference to between
15 April, '72 and the beginning of '73, isn't that so?

16 A No, nothing.

17 Q Now, when did you say you saw these minutes
18 for the first time?

19 A To the best of my recollection, it was cer-
20 tainly after the first of 1973, because we had repeatedly
21 attempted to get Mr. Weitz, who was then the house
22 counsel, to get these things typed and sent to us. We
23 had not even gotten the minutes of the annual meeting.
24 So the auditors were upset.

25 Q It is your contention at this point that that

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1 portion of the minutes didn't take place on that date?

2 A Not that I recall.

3 Q Not that you recall. I see. All right.

4 MR. WOLOSKY: The witness has answered the
5 same question any number of times.

6 Q Did you make a demand after the fiscal period
7 of 1972 upon anyone from the defendant for this 2-1/2
8 per cent referred to?

9 A I don't believe that the numbers were com-
10 pleted by the time I left. They may have been.
11 But, no, I did not make any demand for payment at that
12 point.

13 THE COURT: Where is that exhibit, the
14 pamphlet?

15 I asked you gentlemen to try and compute
16 that 2-1/2 per cent because that should have been done
17 previously. Evidently nobody did it up to now.

18 According to Plaintiff's Exhibit 9 the net
19 income for 1971 was \$1,209,125, and that for 1972 it was
20 \$1,565,183, and the difference, as I compute it, is --

21 MR. WOLOSKY: \$356,000.58.

22 THE COURT: Yes. That should be multi-
23 plied by 2-1/2.

24 MR. ALTER: I suggest \$356,058, your Honor.

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1 THE COURT: Yes. What's 2-1/2 per cent,
2 is it \$8140.25?
3

4 MR. PANISH: The plaintiff's pretrial
5 memoranda --

6 THE COURT: I am going by the evidence
7 in the case, not these pretrial memoranda which have
8 a lot of misstatements on both sides.

9 Doesn't it come down to \$8001.45?

10 THE WITNESS: I get \$8914.50.

11 MR. WOLOSKY: \$8901.45.

12 THE COURT: Now, where are the figures
13 for the fiscal year 1973?

14 MR. ALTER: If I may respond to that,
15 your Honor. When the action began it was during 1973.
16 If your Honor will notice the pleading at that time sought
17 only declaratory judgment as to 1973 because the figures
18 were not yet in.

19 THE COURT: You are at the point of trial.
20 Don't you have the figures now?

21 MR. WOLOSKY: There is no increment in
22 '73, your Honor.

23 THE COURT: All right. That's an answer.
24 The contract was to run until April, 1974. Are there
25 any figures for that period, up to the date of termination

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1 of the contract?

2 You haven't any, all right.

3 Mr. Panish, you say that figure is subject
4 to certain deductions.

5 MR. PANISH: Yes, it is, your Honor.

6 THE COURT: All right, go ahead.

7 BY MR. PANISH:

8 Q Now, Mr. Gavin, notwithstanding the fact that
9 you didn't recall that matter being discussed, did you
10 make it known to anyone from defendant that there was
11 an error in respect to that?

12 MR. WOLOSKY: I don't know what counsel is
13 talking about.

14 THE COURT: He is now talking of when he
15 received the minutes in January, 1973 he saw something
16 which he says was not discussed at the meeting.

17 Is that correct?

18 THE WITNESS: Yes.

19 THE COURT: The question is when you did see
20 the minutes in January, 1973 did you say anything to
21 anyone of the officials with respect to it?

22 THE WITNESS: Yes.

23 THE COURT: To whom did you say anything
24 or with whom did you have a conversation?
25

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1 THE WITNESS: Your Honor, I spoke with
2 Gerald Sprayregen about it.
3

4 THE COURT: Saying what you said to him
5 and what he said to you.

6 THE WITNESS: I told him I don't recall
7 having had that type of paragraph as the resolution
8 at the board meeting. He said he doesn't remember exactly
9 himself, but what do I object to. And I told him that
10 the exclusions were something that we had not discussed.
11 I would not know what he was planning to exclude or what
12 the board was planning to exclude.

13 THE COURT: What did he say to that?

14 THE WITNESS: Like many conversations, your
15 Honor, it ended nowhere and I have lived with the result.
16 We just never --

17 THE COURT: You never got back to it?

18 THE WITNESS: He never got back to it, nor
19 did I.

20 THE COURT: Put your next question.

21 Q Now, in the proxy statement and notice of a
22 special meeting to shareholders dated June 28, 1972,
23 which was marked Plaintiff's Exhibit 5 in evidence, you
24 saw that during your employ with the defendant, isn't
25 that so?

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1 A Yes, I am sure I did.

2 Q Now, it relates to the fact and it mentions
3 that your agreement is amended so that you get an
4 annual rate of \$50,000, do you recall that?
5

6 A Do I recall it from there?

7 Q Do you recall it being in that statement?

8 A I really don't remember if it was or not.
9 I assume it was.

10 Q I will give you the exhibit, sir. Please
11 look at it, page 7 toward the top.

12 A (Witness examines document.)

13 Yes.

14 Q And a little further down it says: "Mr.
15 Gavin is entitled to receive 2-1/2 per cent of the
16 increment, subject to certain exclusions."

17 Do you see that, sir?

18 A Yes.

19 Q And you were president of the company at that
20 time?

21 A Yes.

22 Q At that time when you received a copy of this
23 proxy statement did you speak then to any of the direc-
24 tors of the company concerning that phrase?

25 A I don't know what I did.

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1 Q You were also a stockholder of the company,
2 isn't that so?
3

4 A Yes.

5 Q So that as a stockholder you received all the
6 proxy statements and notices of meetings of stockholders,
7 isn't that so?

8 A Yes.

9 Q And this proxy statement on the same page 7
10 also sets forth, does it not, that you had two stock
11 options, one for 30,000 shares and one for 10,000 shares?

12 A Yes.

13 Q And with respect to both of those stock
14 options, Mr. Gavin, you never signed any agreement toge-
15 ther with the defendant concerning them, isn't that so?

16 MR. WOLOSKY: I am going to object, your
17 Honor, because the witness has just produced and offered
18 in evidence a document signed by the defendant. If
19 he limits it to whether plaintiff signed any document
20 I would have no objection. But he has just produced
21 a document signed by the defendant with respect to the
22 stock options.

23 THE COURT: Put the question whether or not
24 the witness did it.

25 Q Did you, Mr. Gavin, sign any such document

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3 concerning the two stock options I mentioned?

4 A I signed one, I know. I just looked at it.
5 I don't recall if I signed two or not.

6 THE COURT: Is that the one for the 30,000
7 shares?

8 THE WITNESS: Yes, your Honor.

9 Q You signed it in what capacity?

10 THE COURT: That was before you were elected
11 president, wasn't it?

12 THE WITNESS: Yes.

13 Q In what capacity did you sign it?

14 A As the recipient of the option.

15 Q Had you received a copy of it?

16 A Yes. If we are talking about the same thing.
17 Now I am getting confused. If it's the same thing we
18 are talking about, yes.

19 THE COURT: There are two options here,
20 apparently.

21 MR. PANISH: I am talking about 30,000
22 shares.

23 THE COURT: Fix the date of one option and
24 the date of the other. The \$10,000 option was authorized
25 at a meeting of the board, and that was the same meeting
at which the witness was made the president of the

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corporation, elected a member of the executive committee and received an increase to \$50,000. That was April, '72.

Now, what's the date of the 30,000-share option?

MR. PANISH: That's the one I --

THE COURT: What's the date of it, please?

MR. PANISH: April 30, 1971, your Honor.

THE COURT: When?

MR. PANISH: April 30, 1971.

THE COURT: That was soon after he entered the original employment.

THE WITNESS: Right.

BY MR. PANISH:

Q Did you sign any document with respect to that?

A That's the one I thought I signed.

Q So did you sign a document with respect to the other one?

THE COURT: He said no.

MR. PANZER: All right, fine.

THE COURT: The record is clear that he didn't sign it. Move ahead, please.

Q Now, as a matter of fact, you relied on this

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proxy statement, did you not, the one of June 28, 1972?

MR. WOLOSKY: I object.

THE COURT: You what?

Q I say you relied on the facts contained in there with respect to your own position, the option plan, the 2-1/2 per cent increment; didn't you rely on those statements?

THE COURT: Rely on them for what? This proxy statement which went to stockholders?

I suggest we take our luncheon recess and resume at 2 o'clock.

Organize yourself a bit, please.

(Luncheon recess.)

AFTERNOON SESSION(2:00 p.m.)

J O H N A G A V I N resumed.

THE COURT: Proceed, please.

CROSS EXAMINATION CONTINUED

BY MR. PANISH:

Q Now, Mr. Gavin, in addition to the companies that you mentioned which you visited, one in Carbondale, one in Canada, one in Beacon, at those times did you ever take your wife with you?

A I don't recall.

Q Now, in addition to those companies didn't the defendant also operate another company called Steadley?

A Yes.

Q And what business was Steadley in?

A Bed springs.

Q Beg your pardon?

A Bed springs.

Q Did you have any experience in the manufacture of bed springs?

A Prior to coming to Technical Tape?

Q Yes.

A No.

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Q Where were those plants located?

A Carthage, Missouri; Denver, Colorado, Brennan, Texas, and a plant in California.

Q Now, did you visit the one in Texas?

A No.

Q Did you visit the one in California?

A No.

Q Who was the president of that firm during your employ with the defendant?

MR. WOLOSKY: What firm is counsel talking of?

MR. PANISH: Steadley.

A I believe Roger Lawrence was president of Steadley.

Q And in addition to his salary were you aware of the fact that he also received his own bonus from the defendants; are you aware of that?

MR. WOLOSKY: I object to this, your Honor.

THE COURT: I must say that I don't understand the relevancy but to save time let him answer it.

THE WITNESS: Yes.

THE COURT: I must repeat again, I wish counsel would be aware of what the issues are as they are presented under the pleadings.

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You may answer if you know.

A I answered yes.

Q Now, did you ever visit the plant in Colorado?

A Yes.

Q How many times?

A Once, I believe.

Q What was the occasion for that?

A They were talking about the possibility of building another building to house the facility. The lease was expiring on the existing facility.

Q With whom did you go?

A Herbert Degnan.

Q How long were you there?

A I believe two days.

Q And did you visit the one in Missouri?

A Yes.

Q How many times?

A Once.

Q What was the occasion for that?

A There was an annual meeting, shareholders' meeting, held there and we spent the day going through the plant to acquaint ourself.

Q That was the annual meeting for Technical Tape, is that right?

1 rda Gavin-cross 99

2 A Yes.

3 Q As president of the company you made the
4 visit to the Steadley Company where the meeting physically
5 took place, is that correct?

6 MR. WOLOSKY: Objection. As president
7 of what company?

8 Q Of the defendant, sir.

9 A No, that's not correct.

10 Q You were not the president then?

11 A That's correct.

12 Q Were you the president?

13 A No.

14 Q Senior vice president?

15 A Yes.

16 Q So as senior vice president you made a visit
17 to the annual meeting at the Steadley plant, is that
18 correct?

19 A Yes.

20 Q You weren't there to supervise its operations,
21 were you?

22 A No.

23 Q Now, is it your contention that the 2-1/2
24 per cent net increment related to the earnings of all
25 these subsidiary companies of this defendant including

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any acquisitions?

MR. WOLOSKY: I object, your Honor.

THE COURT: Why?

MR. WOLOSKY: The 2-1/2 per cent is written down in the documents in evidence.

THE COURT: I will let him answer.

A Yes.

Q Now, you know what the word "exclusion" means, don't you?

A Yes.

Q Now, do you recall signing an affidavit in this court in connection with your motion for summary judgment on May 20, 1974, called "Reply Affidavit"?

A No, I don't.

Q All right. I show you this affidavit and show you the last page, page 8.

A That's my signature.

Q Yes. Now, in this affidavit I ask you to read the bottom of page 2 and the top of page 3, please.

A (Witness examines document.)

Q Now, you intended that this court rely on your statement contained therein, including the proxy statement of June 28, 1972, is that correct?

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A Yes.

Q And the proxy statement of June 28, 1972, Plaintiff's Exhibit 5 in evidence, specifically related that the 2-1/2 per cent of the increment is subject to certain exclusions, isn't that so?

A Yes. But it doesn't say that Steadley was excluded.

Q Does it say any specific type of exclusion?

A No.

Q As a matter of fact, the board minutes stated subject to exclusions as to be ruled upon by the board at a future date, do you recall that?

MR. WOLOSKY: Your Honor, we have gone into this this morning.

THE COURT: It speaks for itself.

Q Now, is it your testimony, sir, that in the end of December, 1972 you had a conversation with Mr. Gerald Sprayregen regarding Mr. Don Moran's employment?

A Yes.

Q Isn't it a fact that when you testified in the opening of your direct examination you stated that you had the right, the exclusive right or the right to hire and fire or discharge all employees with the

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exception of Charley Katz; do you recall that?

A Yes.

Q Would you know that also included Don Moran as part of your authority?

A I don't understand the question.

Q You stated that you had the right to hire and discharge employees.

A Correct.

Q Do you follow me, sir?

A Yes.

Q Would not that include Mr. Don Moran?

A Yes.

Q Now, notwithstanding the fact that it included Mr. Don Moran you testified that you went to Mr. Gerald Sprayregen in December of 1972 to tell him that you were going to discharge him or that you wished to discharge him?

A That I was going to discharge him.

Q But in fact you did not?

A No, I did not.

MR. WOLOSKY: In fact he did not what?

Q Discharge him.

A No, I did not.

Q And it is your testimony that there was an

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1 agreement made between you and Mr. Sprayregen that you
2 would wait an additional 90 days before you made up your
3 mind?
4

5 THE COURT: He did not testify there was
6 an agreement made. He simply said there was a discus-
7 sion and at the request of Mr. Sprayregen he agreed to
8 defer a decision for a period of 90 days.

9 Q At the end of the 90-day period did you make
10 up your mind as to what to do with Mr. Moran?

11 MR. WOLOSKY: I object to the form of that
12 question.

13 THE COURT: Overruled.

14 A Yes.

15 Q And after you made up your mind did you take
16 any action on it?

17 A Yes.

18 Q Did you discharge him?

19 A No.

20 Q You had another discussion with Mr. Gerald
21 Sprayregen?

22 A That's correct.

23 Q Do you recall the date of that discussion?

24 A It would, I believe, be a Monday or Tuesday,
25 around the 2nd or 3rd, or thereabouts, of April.

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Q Of 1973?

A Yes.

Q Now, after you had that conversation with Mr. Sprayregen did you make a written memorandum of the substance of it?

A No.

Q Did you make any note at all concerning it?

A No.

Q Now, where did that discussion take place?

A In my office in New Rochelle.

Q About what time?

A I believe that was the day he got a speeding ticket on the way up to the office --

MR. PANISH: I move to strike that, your Honor.

THE COURT: He is just trying to fix a date. What difference does it make?

MR. PANISH: No difference.

THE COURT: Why are we wasting time on such details, really? Again, I'm repeating, get down to the fundamentals of the case and bear in mind what the issues are.

A It was afternoon.

Q Was anyone else present during that conversa-

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tion?

A No.

Q Did that take place at your office?

A Yes.

Q And how long did you converse with him?

A It was a rather lengthy conversation, several hours I'd say. Hour and a half, anyway.

Q And did most of this discussion relate to Mr. Don Moran?

A In large measure, yes.

Q Well, in connection with Mr. Don Moran what did you say to Mr. Sprayregen, what did he say to you?

A I told him that I had worked with Moran for the 90 days as he had asked and as I had granted his request. I told him there was nothing that I saw that had changed my mind, that I felt the same way about him now as I did before, that I was going to terminate him.

Q Did you have authority at that time to terminate him?

A Yes, I did.

Q Without any request of the board of directors?

A I felt I did.

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Q Without any request of Mr. Sprayregen?

A I felt I did.

Q Did you at any time during that conversation state to Mr. Gerald Sprayregen that you were thinking or intending to resign from your position if Don Moran was not terminated?

A I had an employment agreement with a year to run and no job to go to. I would never have threatened to resign. I don't give ultimatums and I don't take them.

Q Did you say those words or the substance of those words?

A No.

Q Now, after that conversation did you have a discussion with your wife about it that day or the following day? Just answer yes or no.

A Yes.

Q And there then came a time when you met with Mr. Don Silvestri, is that correct?

A That is correct.

Q And Mr. Don Silvestri was a member of the board at that time?

A Yes.

Q And he was also employed by the defendant?

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A Yes.

Q In what capacity?

A Vice president.

Q And you met at a restaurant, I believe you stated?

A Yes.

Q Is that so?

A Yes.

Q And the fact was it was the Larchmont Inn in Larchmont?

A I thought it was the Carriage House.

Q I'm sorry. The Carriage House in Larchmonth, was it?

A Yes.

Q And in connection with that luncheon you had did you fill out an expense record or report for the defendant?

A Yes.

Q Now, I show you this report and ask you if this is the report that you filled out.

A Yes.

MR. PANISH: I offer it in evidence.

MR. WOLOSKY: I am going to object, your Honor, as totally irrelevant.

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2 THE COURT: I can't tell unless I look at
3 it.

4 MR. WOLOSKY: I'm sorry, your Honor.

5 (Handed to the court.)

6 THE COURT: Well, I'm sure I wouldn't
7 understand its relevancy except it might even give
8 weight to the defendants' testimony, "business asso-
9 ciate, person who entertained, employee."

10 MR. PANISH: I make reference to the
11 lower right-hand side.

12 THE COURT: I'm receiving it. You will
13 have to bear in mind that I will only consider evidence
14 that's material and relevant to the issues in the case.
15 It may be very interesting to know they had lunch at the
16 Larchmont Inn or the Carriage house or they paid X
17 dollars for their luncheon but it adds up to utter non-
18 sense as far as this case is concerned, except the fact
19 that they did have a discussion at that time.

20 MR. PANISH: I'm getting into that, your
21 Honor.

22 THE COURT: Please get into it if there
23 is anything material about it. They could have gone
24 to "Squeedunk" to have lunch. What difference did it
25 make?

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1 rda
2 Q When you filled out this expense report did
3 you not put down that the purpose of it was there was
4 an internal dispute?

5 A Yes.

6 (Defendants' Exhibit D was received in
7 evidence.)

8 Q During that conversation with Mr. Silvestri
9 did the Don Moran matter come up?

10 A Yes.

11 Q Did you at that time state to Mr. Don Moran
12 that you would resign from your position with the de-
13 fendant if Don Moran was not terminated or discharged?

14 MR. WOLOSKY: I think he's got the wrong
15 person in there.

16 A The answer to your question is no.

17 Q Well, what did you discuss with Mr. Silvestri
18 concerning the defendant?

19 A Don Moran's termination.

20 Q Did you tell Mr. Silvestri that you were ready
21 to terminate him?

22 A Yes.

23 Q Could you have terminated him if you wished?

24 A I felt I could have.

25 Q Did you want Mr. Silvestri's approval at that

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time?

A No.

Q Did you want Mr. Sprayregen's approval?

A I didn't feel I needed their approval.

Q But you still discussed it with both of them, isn't that so?

A Yes.

Q Now, after that discussion or conversation with Mr. Silvestri did you speak to Mr. Gerald Sprayregen before the April 6, '73 board meeting?

A Yes.

Q Where did you speak to him?

A He called me on the phone in my office.

Q On what date was that?

A I believe that was a Wednesday. It seemed to me it was a Wednesday because it was two days to the board meeting.

Q What did he say to you at that time, what did you say to him?

A He asked me if I could attend the board meeting on Friday morning.

Q And what did you respond?

A Yes.

Q Did he at that tell you what the board meeting

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1 would be about?

2 A No.

3 Q Did you ask him?

4 A No.

5 Q Did you think it was important?

6 A No.

7 Q Was the board meeting otherwise scheduled
8 for that date, as far as you knew at that time?

9 A To my recollection there was never a
10 scheduled board meeting.

11 Q Did you sign a written waiver as a director
12 in connection with that April 6, '73 board meeting?

13 A Yes.

14 Q That could have been brought up before the
15 board; do you recall that?

16 A Yes.

17 Q You are positive in your assertion now that
18 Mr. Sprayregen did not mention to you the purpose of
19 this meeting?

20 A He absolutely did not mention it.

21 Q Now, you stated the meeting was commenced
22 about 8:30 on April 6th of '73.

23 A Yes.

24 Q Until such time that you had a sort of private
25

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conversation with Mr. Sprayregen, do you recall that?

A When did I have the private conversation?
I am sorry. I missed that.

Q The meeting started at 8:30; do you remember that?

A Yes.

Q How long did the meeting take place in the morning session?

A The meeting itself didn't take long. The discussion I had with Mr. Sprayregen took until 2 o'clock.

Q I am asking how long the meeting took, sir.

A Certainly no more than an hour.

Q No more than what?

A Certainly no more than one hour, to the best of my recollection.

Q During the course of that meeting and at the opening of it did Mr. Gerald Sprayregen announce to the members of the board, including yourself, the purpose for which this meeting was held?

A Yes.

Q Did you voice any objection at that time?

A I believe I testified earlier that Mr. Sprayregen launched into a speech advising the other board

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members and myself what it was that he said I said.

Q Then you said there was some shouting, I believe.

A Oh, yes.

Q Now, after the shouting one of the board members that was present was Mr. Gerald Sprayregen's father, Mr. Herman Sprayregen, is that correct?

A Yes, he was there.

Q Did he at that time ask you any questions concerning Don Moran?

A Yes, I believe he did.

Q How many times did he ask you a question, do you recall?

A No, I don't.

Q Was it two or three times?

A I have no idea.

Q Do you recall what the question was?

A No, I do not. There were a lot of questions being asked.

Q Concerning Don Moran's termination and your resignation?

MR. WOLOSKY: Objection, your Honor.

THE COURT: Objection sustained.

Q Do you recall being examined before trial in

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1 this case?

2 A Yes.

3 Q Now, on March 11, 1974 you were examined by
4 the defendants' counsel at which time your attorney, Mr.
5 Amos Alter, was present in this courthouse; do you
6 remember that?

7 A Yes.

8 Q Before you were examined you swore and gave
9 an oath that you would tell the truth during the course
10 of the examination.

11 A Yes.

12 Q Now, I ask you whether you were asked these
13 questions and did you give these answers --

14 MR. WOLOSKY: Tell us where you are
15 reading from.

16 MR. PANISH: Page 144, line 7.

17 Q -- "Q Did Mr. Herman Sprayregen then ask you
18 to state to the board whether in fact you had ever issued
19 such an ultimatum?

20 "A He did not at that point since Mr.
21 Sprayregen after my -- Mr. Gerald Sprayregen, after my
22 denial of his version of what took place, became very,
23 very angry to a point where he was screaming himself
24 hysterically. Then when he composed himself Mr. Spray-
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1 regen made a comment or asked a question. Mr. Herman
2 Sprayregen asked a question.

3 "Q Directed to you?

4 "A Yes.

5 "Q And Mr. Herman Sprayregen asked you
6 to state to the board whether in fact you had made such
7 an ultimatum to Gerald Sprayregen?

8 "A That might have been the question.
9 I don't recall exactly.

10 "Q Was the question something like that?

11 "A I don't really recall."

12 Do you recall giving those answers to those
13 questions?

14 A Yes, I do.

15 Q And you testified that although you didn't
16 recall the exact question, you did recall that you
17 were asked questions by Mr. Herman Sprayregen?

18 A I believe I testified that I was asked
19 question by a lot of people.

20 Q Including Mr. Herman Sprayregen?

21 A Yes.

22 Q And there came a point in this board meeting
23 that a vote was taken with respect to whether or not Don
24 Moran should be terminated; do you recall that?
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Gavin-cross

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A Yes.

Q And you voted that he should be terminated?

A Yes.

Q And the other board members disagreed with you and they had the vote, is that correct?

A Yes.

Q You then had a conversation with Mr. Gerald Sprayregen?

A Yes.

Q When did that conversation start to take place?

A After another shouting match of one sort or another, I believe I mentioned this morning, he screamed, he was very angry.

Q Did you scream?

A No, he was screaming.

Q I see.

A He ran down the hallway, was gone a minute and a half, maybe two minutes, screaming, telling me to get out of his office. I told him I would not leave, that he would have to put me out.

He came back into the room, asked the other people to leave, and said that he wanted to talk to me privately, and talk we did.

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Q And for how long a time?

A Until approximately 2 o'clock in the afternoon.

Q And when did this commence?

A Well, whenever he chased the other people out of the room. Probably 9:15, 9 o'clock, 9:30.

I really don't know.

Q So you spoke about three, three and a half hours.

A It was a long conversation, yes.

Q All right. And during that long conversation he made known or was it indicated to you this board meeting would resume when you got done speaking to Mr. Gerald Sprayregen?

A He didn't say it to me.

Q Did anyone else say it to you?

A No, not to my knowledge.

Q Did anyone adjourn the meeting?

A I don't recall that it was ever adjourned. I'm not sure. There was a great deal of turmoil.

Q Do you know who was taking minutes at this meeting?

A I didn't see anybody taking minutes but Howard Weitz, I'm sure, would have been the one charged with the responsibility.

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Gavin-cross

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Q And Howard Weitz was a member of the board?

A Yes.

Q And Howard Weitz was an attorney?

A Yes.

Q And he took minutes on prior occasions.

A I believe I testified earlier that that would be difficult for me to say because they were about a year late in coming down, so I don't know.

Q I asked you whether he took minutes on prior occasions?

A Yes, he did.

Q And he did that in your presence?

A I was in the room with him, yes.

Q You were a member of the board, weren't you?

A Yes, I know that.

Q And you knew whether he took minutes or not?

A I could not tell what he was writing.

Q He was writing?

A He was writing. He was taking minutes, undoubtedly.

Q And about 2 o'clock, when you completed your conversation or discussion with Mr. Gerald Sprayregen, did you leave the building?

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A Yes, I did.

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Q And went home?

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A Yes.

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Q As a matter of fact, on other Fridays you

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usually left early too, did you not?

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A No.

8

Q You never left early in the afternoon on a

9

Friday?

10

A Sometimes, yes.

11

Q Several times a month or a week?

12

A Well, I could only do it once a week if I

13

was leaving on Friday, but in the summer, because of the

14

heavy traffic in the shore area and I had an 87-

15

mile drive one way, I would leave sometimes approximately

16

3 to 4 o'clock. But there were many occasions on Fri-

17

days, notwithstanding summer traffic, that I was en-

18

gaged in the meetings on Friday afternoon until well

19

past 5 o'clock.

20

Q Where did you reside at the time?

21

A I resided in Sea Girt, New Jersey.

22

Q You say that was around 70 miles away?

23

A Eighty-seven.

24

Q Now, during weekdays did you commute up and

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back?

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A Most times.

Q Well, didn't you stay over many times?

A Yes.

Q If not most times?

A I'm sorry.

Q I say didn't you stay over in the New Rochelle area?

A Yes.

Q Most of the times?

A Not most times, no. A night or two a week.

Q And that was paid for by the defendant?

A Yes.

Q Where did you usually stay?

A I stayed in the White plains Hotel mostly.

Q Did they have a bar there?

MR. WOLOSKY: Your Honor, I think we are getting far afield and I am going to object to this line of questioning.

THE COURT: What difference does it make where he stayed? It has as much significance in this case as to where they had lunch where they discussed these matters.

Q Now, after you went home did you speak to

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Mr. Gerald Sprayregen the following day, Saturday,
April 7th?

A Yes.

Q How many times?

A Twice, to my knowledge.

Q Beg your pardon?

A Twice, to the best of my knowledge.

Q By telephone?

A Yes.

Q Did he call you?

A Yes.

Q What was the substance of that conversation?

A The first phone call had to do with a question
about information he had received about a man we were
going to hire, Walter Wolf. I believe I testified to
that.

Q In what capacity?

A He was going to be hired as consumer products sales
manager.

Q And when did that conversation take place?

A Some time around noon, I would say.

Q And when did the second conversation take
place?

A Later in the afternoon.

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Q He called you again?

A Yes.

Q And what was that concerning?

A Again he started to talk about Walter Wolf, further information he had apparently gotten. It was decided to go ahead and hire Walter Wolf, that the information apparently was wrong.

He mentioned to me at the time that he was upset over the fact that what happened the day before had to have happened, and I allowed as to how I was sorry that it came to that too. He said, "In essence all I want you to do is come back to work." And I said that I had every intention of coming back to work.

Q That was his statement to you at that time?

A Yes.

Q Did you make a note of that conversation?

A No.

Q Did you converse with him on Sunday, the next day, April 8, '73?

A Yes.

Q Did he call you then?

A I believe I testified earlier that he called me a number of times, though I was not there to get the

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call.

Q I am talking about the time he actually spoke to you.

A Oh, I called him.

Q Is that also about Walter Wolf?

A The Sunday evening conversation? No, it was not about Walter Wolf. He said, "John, I have a letter I want to read to you. You will get a copy of it in the mail."

Q That's the letter you testified to that he read and you received it?

A Yes.

Q And then you came to the defendants' place of business on Monday, the following day?

A Yes.

Q And at the time you arrived there you say Mr. Gerald Sprayregen was already there?

A Yes.

Q He had some personal belongings that were set aside for you?

A They were packed in boxes out in the hall.

Q Did you have a conversation with Mr. Gerald Sprayregen that morning?

A Yes.

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2 Q Did you discuss money with him?

3 A Yes.

4 Q Did you discuss your past expenses which you
5 advanced on behalf of the defendant?

6 A I'm sorry. You'll have to repeat that.

7 Q Did you discuss certain expenditures that
8 you advanced for the defendant at that time?

9 A Not that I recall.

10 Q Well, were there times when you made advances
11 and then you would seek reimbursement?

12 A Are you referring to my paying something
13 that's a reimbursable expense?

14 Q I am asking about moneys that you laid out
15 on behalf of the defendant for which you anticipated
16 being paid back. That's what I'm referring to.

17 MR. WOLOSKY: Are you referring to travel
18 and entertainment expenses?

19 MR. LPANISH: Partially, yes.

20 Q Do you know what I am talking about?

21 A I'm really not sure.

22 Q Travel and entertainment, if you want to
23 call it that.

24 A Have I made travel and entertainment expendi-
25 tures that I expected to be reimbursed for? Yes.

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Q Did you speak to Mr. Sprayregen that morning of April 9th concerning it?

A Concerning what?

Q Travel and entertainment.

A Not that I recall.

Q I am going to show you a series of documents and ask you if your signature is affixed to them.

A (Witness examines document.)

Yes.

Q And they refer to what, sir?

MR. WOLOSKY: Objection, your Honor.

THE COURT: They speak for themselves.

MR. WOLOSKY: Unless they are received in evidence.

MR. PANISH: I will offer them in evidence.

Q There is another sheet that I didn't show you. Is that your signature on it?

A Yes.

MR. PANISH: I offer it together with the others as exhibits.

MR. WOLOSKY: May I understand what you are offering here. Are you offering the top sheet with attachments?

MR. PANISH: With the attachments, right,

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as certain expenditures then and there checked.

MR. WOLOSKY: I object. It is completely irrelevant. I don't see any relevancy whatsoever.

THE COURT: I think you asked the witness whether or not he had a discussion about reimbursement of expenses on the morning of April 9th and he said he didn't recall. What are these items about?

MR. PANISH: This shows, your Honor -- and I don't like to say this in the presence of the witness because it is anticipating my testimony, and if I may have the witness excluded I will be glad to explain it.

THE COURT: I won't exclude him. I will receive it under the doctrine I announced before, of sitting in a nonjury case. I think we move along a little bit better rather than listen to extended points, aimless argument and discussion.

(Defendants' Exhibit F was received in evidence.)

THE COURT: I assume the witness was entitled to reimbursement of expenses incurred with the discharge of his duties.

Put the next question, please, and move along.

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BY MR. PANISH:

Q I show you this check dated April 9, 1973, in the sum of \$1526, and ask you if that's made to your order and whether it bears your endorsement on the reverse side.

A Yes.

MR. PANISH: I offer that in evidence. This is in connection with the prior exhibit.

MR. WOLOSKY: Your Honor, I am going to object to it on the grounds I previously stated. Also on the grounds that if this is meant to be any evidence of some sort of accord and satisfaction --

THE COURT: I have ruled out accord and satisfaction.

MR. WOLOSKY: We are making no claim in this action with respect to reimbursed expenses.

THE COURT: It may be received for whatever value it has.

MR. WOLOSKY: Note my objection.

THE COURT: It has as of now a zero value.

(Defendant's Exhibit F was received in evidence.)

Q Do you recall in that same conversation of April 9, 1973 about arriving at any figure in connection

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with your employment at the time you spoke to Mr.
Sprayregen?

A I don't follow the question.

Q Did you talk money with him?

A Yes.

Q Were certain figures mentioned?

A There were lots of them?

Q Just answer yes or no.

A Yes.

Q Did there come a time when a definitive figure
was mentioned between you two?

A Are you speaking with respect to termination?

MR. WOLOSKY: Mr. Gavin, let's wait until
we get a question.

I am going to object to that, your Honor.
The question is vague, ambiguous.

THE COURT: What are you referring to, the
conversation of April 9th?

MR. PANISH: Yes.

THE COURT: Did you have any discussion
at that time?

THE WITNESS: With respect to termination
pay, your Honor?

THE COURT: Or figures.

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THE WITNESS: Yes, we did.

Q You spoke to Mr. Gerald Sprayregen?

A Yes.

Q Now, during the course of that discussion did you then receive a check from Mr. Sprayregen?

A I believe. I don't know if it came from him but I received a check that day.

Q From someone at the defendant?

A Yes.

Q I show you this check dated April 9, 1973, payable to your order, in the sum of \$1538.46 and ask you if that's the check received and whether it bears your endorsement on the reverse side thereof.

A Yes, it does.

MR. PANISH: I offer it in evidence, your Honor.

MR. WOLOSKY: I object on the grounds previously stated with respect to the other check.

THE COURT: Objection overruled.

(Defendants' Exhibit G is received in evidence.)

THE COURT: What discussion was had about this check or was there any discussion prior to your receipt of it?

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1 THE WITNESS: Your Honor, I'm not sure what
2 the check is?

3 THE COURT: There are two checks here.

4 THE WITNESS: There are two checks. One
5 I remember the amount should equal two weeks' vacation
6 pay which I had accrued at the time and as well as a week
7 that was held back because of the method of figuring the
8 payroll. We run about a week behind. So that in
9 essence brought me up to date in everything that I had
10 coming.

11 Q How much were you receiving a week at that
12 time?

13 A I don't know what it broke down to. It
14 was 50,000 divided by 52. I don't recall exactly
15 what the figure was. \$900-something.

16 THE COURT: You may proceed.

17 Q Mr. Gavin, isn't it a fact that your gross
18 pay at that time was \$961.54 per week?

19 A If that's what it works out to, yes.

20 Q Now, were you familiar with the so-called
21 union problem that was had at the big New York plant some
22 time around March, beginning of April, 1972?

23 A Yes.

24 Q When were you apprised of that for the first
25

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time.

A Shortly after I came into the company.

Q That would be around April of '71?

A Yes.

Q And that problem continued through March and April of 1972, is that so?

A Well, when you say a problem, it wasn't a problem other than the fact that there was a union, the Textile Workers Union, who had been for years trying to organize the Beacon, New York facility.

Q What was management trying to do?

A We were trying to keep the independent union that had been in existence?

A Did you go up to the Beacon, New York plant in reference to that matter?

A Yes, I did.

Q Who did you speak to?

A I went up specifically one evening to speak to five representatives of the maintenance department who were speaking for the maintenance people, some 27 or 30-odd people. It seems they didn't want to sign the card, whatever that means. Frankly, I have forgotten the significance of it. But it seems in the course of the election they had to sign these cards

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1 and they had threatened not to, had said they would
2 not do it. Apparently after the decision they didn't
3 want to go along with the vote.
4

5 I went up with the understanding that I had
6 no alternative but to explain to them that if they did
7 not sign the card I had no alternative or the company had
8 no alternative other than to dismiss them all, since it
9 was a requirement of the National Labor Relations Board.

10 Q What happened as a result of the vote?

11 THE COURT: What happened when? I didn't
12 hear.

13 MR. WOLOSKY: He asked what happened as a
14 result of the vote.

15 I am going to object.

16 THE COURT: What has this to do with the
17 case, will you please tell me?

18 MR. PANISH: Performance of his duties,
19 your Honor.

20 THE COURT: What was he supposed to do with
21 respect to a labor dispute that's under the supervision
22 of the National Labor Relations Board? Have you lost
23 all sense of balance as far as the issues in this case
24 are concerned?

25 Q Now, other than the April 5, 1971 agreement,

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Mr. Gavin, you agree, do you not, that you signed no other written modifications concerning that agreement during your employment there?

A Not to my knowledge.

Q And weren't you the only employee of the defendant that received medical insurance for yourself and your family?

A I really don't know.

Q Do you know of any others that did?

A I never thought about it.

Q Now, at the time you received or saw the April 25, '72 board minutes, which I believe you said was at the beginning of 1973 --

A Right.

Q -- Mr. Howard Weitz was counsel for the company, was he not?

A Yes.

Q At that time did you speak to him that those minutes required any type of corrections?

A No. He was not the man to talk to.

Q Did you speak to him?

A No

Q Now, I show you this article of April 10, 1973 in the Wall Street Journal. Have you seen this

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2 before, Mr. Gavin?

3 A Yes.

4 Q Does it mention your resignation?

5 MR. WOLOSKY: Objection, your Honor. I
6 object to it.

7 THE COURT: Suppose it does. He wrote a
8 letter where he said the facts contained therein weren't
9 true. You don't think I am going to accept a hearsay
10 statement that appears in the Wall Street Journal as
11 an actual fact, do you?

12 MR. WOLOSKY: No, your Honor.

13 THE COURT: What's wrong with you lawyers,
14 on both sides? This witness answered that article.
15 He didn't answer, he wrote with respect to it and denied
16 it was true.

17 What significance do you think it has that the
18 Wall Street Journal publishes a story? I have seen
19 enough stories in newspapers of cases I was trying not
20 to recognize the case I was trying.

21 Q Did you make any projection --

22 THE COURT: Let's not get down to evidence,
23 with respect to the parties that what was said and what
24 was done.

25 Q Did you make any projections as to sales and

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profits of the company during your tenure as president?

A Yes.

Q Did you meet with other members of the company regarding the budget projections of the company?

A Yes.

Q Did you make any presentations of the projected budget to the board of directors of the company?

A Not to my recollection.

Q Did you consider that to be important or unimportant?

A I considered to have the projections -- I considered projections as reasonably important in order to tell you what you expect to do, but I don't know that it is necessarily important that you present it to the board.

Q Did the sales and profits figures that were set forth in the budget come to fruition in actuality?

MR. WOLOSKY: I object to this on the ground we have no budget here, no figures here. I don't know what budget he is referring to. Also on the grounds of relevancy and materiality.

THE COURT: Your objection is proper but it would be a remarkable thing in the industrial-commercial life of this nation that projections by boards of directors,

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heads of companies, whether it is U. S. Steel, Ford Motor Company, Chrysler, Bethlehem Steel or any other one came to fruition exactly as it was projected. In years there were estimates so much out of line that one wondered how they came at their projections.

What is this to prove? Is he supposed to guarantee that a budget will come through?

MR. PANISH: But he should come reasonably close to it, I should think.

THE COURT: No wonder you have a time expectation you have here.

Finish the question. Where is the budget and what are the figures? Let's look into it as long as you got into it. Take him year by year that he was there. He started in 1971, I believe. Or course he was not the president then.

Q At the end of 1971 did you help in formulating the budget?

A Yes.

THE COURT: I take it he wasn't the only man involved in formulating the budget.

MR. PANISH: Of course not.

THE COURT: Are you bringing any action against the other people who participated in it, the

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members of the board?

Please get down to brass tacks and the issues in this case and let's not wander far afield. The issues are very, very simple in this case.

Q After April 6, 1973, did you make any efforts to seek other employment?

A Yes.

Q Did you seek employment with a company called Spec Tape?

A No.

Q Did you receive any income from that company?

A Yes.

Q For what reason did you receive the income?

A For consulting work that I was doing for them.

THE COURT: What was the amount of income you received in that year from April 9th to the termination date of the contract, which was April 5, 1974? Do you have the figures?

THE WITNESS: My attorneys do, your Honor.

THE COURT: Didn't you question him about this in the deposition?

MR. PANISH: I did.

THE COURT: Why must there be a discus-

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sion about it if you have it in evidence.

MR. PANISH: \$1700.

THE COURT: Is that correct?

THE WITNESS: Yes, sir.

THE COURT: Did you have any other source of income as a result of your work or activities during that succeeding year, that is, from April 9, 1973?

THE WITNESS: Yes, sir, I did.

THE COURT: What was the amount of income you had.

THE WITNESS: It is difficult, your Honor, because if I may --

THE COURT: Explain it if it is difficult.

THE WITNESS: I got it from a number of various sources.

THE COURT: I'm not talking dividend income, interest; I'm talking of income you received as a result of employment, consultative activities or otherwise.

THE WITNESS: I hadn't been employed, I was consulting, but the total figure I believe to be about 21-odd thousand dollars. But I started my own business in the meantime and it was offset by a loss of some \$15,000. I think I had a net of some 6000, if I am not mistaken.

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THE COURT: Go ahead, proceed, Mr. Panish.

BY MR. PANISH:

Q With respect to the \$1700 from Spec Tape, just tell us briefly what services you rendered.

A I served as a consultant for adding additional distribution to their network of distributors.

Q You then went out to see whether you could obtain other firms for this company?

A Yes.

Q And the firm that you did obtain was which one?

A W. Evans Company.

THE COURT: W.-what?

THE WITNESS: Evans Company.

Q Did W. Evans Company, prior to the time you obtained them from Spec Tape, purchase from Tuck Industries?

MR. WOLOSKY: Objection, your Honor.

THE COURT: I'll allow it.

A I don't know if they did or not. They may have.

Q You don't recall now whether or not they were a customer?

A Not particularly, no.

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Q How much did you receive for obtaining that customer for Spec Tape?

A \$1000 per the agreement.

Q You also had another \$700?

A Yes.

Q And could you tell us how that \$700 was made up, for what services?

A The agreement with Spec Tape was that I would work at a rate of \$100 a day plus expenses and receive \$1000 for any distributor that I recommended that they accepted and came into the fold.

Q And \$700 was for the seven days at \$100 a day?

A Yes.

Q What type of company is Spec Tape?

A Basically it's a concept that had been arrived at back around 1966 or so, formed by a man named Jim Brown in Cincinnati, Ohio. He put the idea together that he would band together as a group large tape distributors, people who sold a lot of pressure sensitive tape.

Arming these people in unison they would buy private label material from people like Technical Tape, Minnesota Mining, 3M, and so forth, and because of their muscle and because they would be dealing

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1 on a private label business, Spec Tape as a label as
2 opposed to Tuck or something else, that they would have
3 enough muscle to command lower prices from the mills
4 because of their big volume and also that they would then
5 have the only brand of Spec Tape in any given market
6 area. That was the concept.
7

8 Q Spec Tape actually made its purchases from
9 the defendant Tuck Industries?

10 A Some of them.

11 Q A good part of it?

12 A No.

13 Q But in your capacity as the chief operating
14 officer and as senior vice president and as president,
15 you were aware of this company, were you not, and all
16 the distributors it had or most of them?

17 A Oh, sure.

18 Q Now, in addition to that company, didn't you
19 also receive income from a company by the name of Manco?

20 A Yes.

21 Q How much did you receive from that company?

22 A About \$750 or so.

23 Q Wasn't it \$795?

24 A \$795?

25 Q That's what you testified to at your examina-

1 rda Gavin-cross 142

2 tion before trial. Do you wish to affirm that now?

3 A I'm sorry if I was off \$45, Mr. Panish.

4 Q 795?

5 A That's what it is.

6 Q And Manco is owned by whom?

7 A I know the president. I believe he owns
8 it, Jack Kahl.

9 Q And who else?

10 A I don't know of anybody else.

11 Q Isn't there a Mr. Anderson there?

12 A No, Mr. Anderson I believe is dead.

13 Q But at that time?

14 A No. I believe he's been dead for years.

15 I know he certainly has been retired for years. Either
16 one. I never met Mr. Anderson.

17 Q Do you have your income tax return for the
18 year 1973?

19 A Do I have it?

20 Q Yes.

21 A No.

22 Q You do not have it?

23 MR. WOLOSKY: We have it, your Honor.

24 MR. PANISH: Will you produce it, please.

25 ((Pause.))

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(Pause.)

MR. WOLOSKY: Here you are (handing).

Q I am going to show you the copy that your attorney produced of your 1973 federal income tax return and I ask you if that's the copy you gave to your attorney.

A I assume it is. The accountants gave it to the attorney. I didn't give it.

Q Does that purport to be a correct copy, the one you filed with the federal government?

A Yes. Let me see if my signature is on it. I will know for sure.

I'm assuming it is.

Q Is that a joint return?

A Yes.

Q With your wife?

A Yes.

Q Did she have any income?

A No.

I can't find a signature.

Q That's a copy. The original was signed when you went it in to the government.

A I'm sorry. You're right.

MR. PANISH: I offer it in evidence.

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MR. WOLOSKY: No objection.

(Defendants' Exhibit II was received in evidence.)

Q Now, was W. Evans one of the big Tuck distributors at that time?

A I don't believe so, that they were necessarily a big Tuck distributor. I don't really recall. W. Evans did not only sell Tuck tape, they sold 3M and a large customer of Mystic.

Q Did you go to see some other distributors?

A Yes.

Q Some known as TOP distributors?

A Yes. I believe one or two were.

Q Tell us what a TOP distributor is.

A It's a distributor who agrees to purchase a product from Tuck under the terms of Tuck's marketing policy.

Q And how many such distributors were included in TOP?

A I believe I said 200, 250. I really don't know.

Q Did you go out to the Midwest to see other distributors?

A Yes.

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Q Do you recall the names of those?

A I went to see Carlson Stapler, I went to see Noqq Brothers, N-o-g-q, Tape Specialists, American Paper & Supply. I can't recall any more, though there may have been more.

Q Those are firms that dealt with the defendant?

A Not all of them.

Q Did they deal with the defendant through TOP?

A That question cannot be answered.

Q Did there come a time when you entered into business for yourself in 1973?

A Yes.

Q Was that under a sole proprietorship?

A Yes.

Q Under what name?

A Encore, E-n-c-o-r-e, Tape & Label.

Q And when was that business formulated?

A Approximately August or September of 1973.

Q And that was a trade name under which you engaged?

A Yes.

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Q And where was its place of business located?

A Neptune, New Jersey.

Q And what business was it in?

A I was engaged in the manufacture of pressure sensitive tape.

Q And was that tape similar to the ones being sold by the defendant Tuck Industries?

MR. WOLOSKY: I am going to object to this. There is no foundation for this type of testimony.

THE COURT: I'll allow it.

A It could be, yes.

Q Did there come a time when you made purchases from this defendant?

A Yes.

Q And did you make purchases on credit?

A Yes.

Q As a matter of fact, there is still a bill outstanding, is there not?

MR. WOLOSKY: Objection, your Honor.

THE COURT: Objection sustained.

Q Did you keep books and records of your sales in connection with this business?

A Yes.

Q Can you produce those, please?

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THE COURT: We will take our midafternoon recess.

(Recess.)

THE COURT: Please proceed.

BY MR. PANISH:

Q Mr. Gavin, in connection with the sales that you made in 1973 were you required to file State of New Jersey quarterly sales tax reports?

A Yes, I believe I was.

Q What is the date of the first report? For what period of time did you file in connection with this business, Encore Tape & Label?

A Probably the fourth quarter, I imagine.

Q 1973?

A Yes.

Q Did you file anything for the third quarter?

A I'm not sure had to. I'm not sure if there were any sales in the third quarter.

Q Did you bring copies of those quarterly returns?

A I didn't, no.

Q Did your attorney?

A I have no idea.

Q Didn't you give copies to your attorney?

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2 A I don't know if I did.

3 MR. WOLOSKY: Your Honor, we have turned
4 over to counsel all documents that we have in our
5 possession, and I note that none of these documents which
6 we have turned over or voluntarily produced today have
7 been subpoenaed by counsel for the defendant.

8 MR. PANISH: None of the documents encompass
9 the quarterly returns, some of which they showed me during
10 a discovery inspection but not all of them.

11 Will counsel produce the returns that were
12 shown to me at a discovery and inspection in this pro-
13 ceeding?

14 MR. WOLOSKY: Counsel, I believe during the
15 discovery you had every opportunity to request copies
16 of documents produced for you. However, if you want
17 to make a specific request now, even in the absence of
18 a subpoena, we will attempt to get that information for
19 you.

20 Q Now, Mr. Gavin, who maintained the sales book
21 of this company?

22 A Mrs. Gavin.

23 Q Did she make all the entries in this book?

24 A I may have made a few but not many.

25 Q Did you record all the sales that you made?

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A Yes, to the best of my knowledge.

Q Before the recordation was made did you base it upon certain invoices that you sent out to customers?

A Yes.

Q Did you produce those invoices?

MR. WOLOSKY: I am going to object to this. We have produced the witness' tax returns, we produced records of the company. There is no reason to question the witness on what documents he produced and what documents he hasn't produced. The records of the company were made available during the discovery proceedings. The defendant can subpoena any records that he wishes. This is not the place to discuss the production of documents when full and complete discovery has already been had and other remedies are available to defendants under the Federal Rules of Civil Procedure.

MR. PANISH: It was not made available, your Honor. A number of returns were never shown to me and I made a demand for them.

THE COURT: There is a means of compelling their production, is there not, under the discovery rules? Why do we have to spend time on that now? One of the reasons for the discovery rules is to eliminate

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taking time during the conduct of the trial.

Please proceed with your examination.

Q Did you turn over the records of this company to your accountant in preparation of your 1973 income tax return?

A Yes.

Q What is your accountant's name?

A Hyman Ketchel.

Q Is he located on Broadway in this borough?

A Yes.

Q Did you deliver to him the invoices representing the sales you made on this business?

A He would have taken them from my office had he deemed them necessary. I don't recall if he took them or not.

Q Did he go to your office in Neptune, New Jersey?

A Yes.

MR. WOLOSKY: I object to this line of testimony.

THE COURT: Mr. Panish, with due respect, this is getting to be a painless kind of questioning, certainly it is as to matters that should have been probed into, if you deemed them material, prior to the trial.

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Frankly, I don't understand this at all.

MR. PANISH: Your Honor, I probed --

THE COURT: Go ahead, will you.

MR. PANISH: I even have the accountant under subpoena but he is being evasive and not appearing in court.

THE COURT: It's almost ridiculous subpoenaing an accountant with respect to this item of asking for invoices. If you wanted to subpoena him why didn't you depose him as a witness before the trial?

Q Now, Mr. Gavin, going back a little bit you stated that you had authority to fire Mr. Moran or discharge him if you so desired?

A Yes, I felt I did.

Q Did you in fact discharge Mr. Moran?

A No, I did not.

Q Why not.

A Because I had given Mr. Sprayregen the courtesy of a 90-day extension on his termination, which I did reluctantly at the April argument or discussion with respect to Moran.

He asked me for another couple of days to think about it. He clearly stated that in light of a long-term relationship and in light of the fact that he con-

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1 sidered it to be a very important matter would I give
2 him time to think about it, that there was no reason
3 why it had to be done right now. While I disagreed
4 with the fact that we needed any more time, I felt that
5 part of his argument was right: if we had gone this far
6 another few days wasn't going to make a difference.
7

8 Q And even when you spoke to Mr. Silvestri
9 you could have discharged him at that time, isn't that
10 so?

11 MR. WOLOSKY: Objection.

12 THE COURT: You went over that earlier
13 today. Let's not repeat.

14 Q Did you speak to your wife and tell her that
15 you intended to resign on that Monday, April 2, 1973?

16 THE COURT: That isn't the date. That's
17 the week before.

18 Q Did you speak to her and tell her of your
19 intentions at that time?

20 MR. WOLOSKY: Objection.

21 THE COURT: I'll let him answer if he
22 talked to his wife about it.

23 A Yes, I talked to my wife about the Moran
24 situation. She was aware of the problem.

25 Q Did you tell her that you intended to resign?

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A No.

Q Did she ask you whether or not you intended to resign?

A Not that I remember.

Q Did you speak to her after that date during that week about it?

THE COURT: Objection sustained on the court's own motion now.

Q Now, Mr. Gavin, do you recall the firm of Marco Sales Associates?

A Yes.

Q Who is the owner of that firm?

THE COURT: You asked him that earlier this afternoon and he said Mr. Jack Hale.

MR. PANISH: This is another firm. This is M-a-r-c-o.

Q Who is the owner?

A What is the question?

Q Who is the owner of Marco Sales Associates?

A Philip Marchese.

Q How long have you known him, if you did know him?

A I met him first in 1959 for one day and then I saw him again after I joined Technical Tape as presi-

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dent or as senior vice president.

Q In 1972 what business was Marco Sales in?

A I'm not sure of the date. At some part, I believe, of 1972 he was a partner in Martin, M-a-r-t-i-n, Packaging Company.

Q What business was Marco sales in?

A Marco sales, when he left his partnership, was essentially a manufacturer's representative, I suppose you would best designate it as.

Q Well, didn't that firm sell a Tuck automatic labeler.

A He did after some time in 1972, yes.

Q Around April of 1972?

A I believe that's the date we entered into the agreement, yes.

Q Did you enter into contracts on behalf of of the defendant in 1972 regarding commissions paid on sales and rentals of the Tuck automatic labeler?

A Yes.

Q Did there come a time when you entered into such a contract with Marco Sales Associates?

A Yes.

Q Dated April 28, 1972?

A Possibly.

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2 Q I show you this letter of that date and
3 ask you if that's the one you signed as president on be-
4 half of the defendant with this firm, Marco Sales
5 Associates?

6 A Yes.

7 MR. PANISH: I offer it in evidence.

8 MR. WOLOSKY: We have no objection, your
9 Honor.

10 (Defendants' Exhibit I was received in
11 evidence.)

12 Q What is a Tuck automatic labeler?

13 A It's a label applying machine.

14 Q Now, that contract called for 30 per cent
15 commission to Marco, is that correct?

16 A Yes.

17 Q Now, before you entered into this disagree-
18 ment did you try to ascertain what the representative
19 or average commission is on sales of this Tuck automatic
20 labeler?

21 A If you mean did I go to competitors and see
22 what they were paying, the answer is no.

23 Q And as president of the company wouldn't you
24 deem it important to see what competitors were paying
25 for things?

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2 A No.

3 Q Well, the higher the commission that the
4 defendant was paying would diminish their own profits,
5 would it not?

6 MR. WOLOSKY: I am going to object to this
7 line of questioning, your Honor. I don't see where
8 it is going. The contract speaks for itself.

9 THE COURT: Overruled.

10 Q You may answer it.

11 A I'm sorry. What is the question?

12 Q I say the higher the commission that the
13 defendant was paying, in this case to Marco, that would
14 in effect diminish or decrease their own profits, would
15 it not?

16 A Not if the commission paid was sufficient to
17 stimulate addition sales. It wouldn't diminish the
18 profit, it would increase the profit.

19 Q You mean if they paid a 30 per cent commis-
20 sion instead of, say, a 10 per cent or 15 per cent
21 commission, it would be better for the defendant?

22 MR. WOLOSKY: Objection, your Honor. That's
23 not what the witness said. The question is argumenta-
24 tive.

25 THE COURT: It certainly is argumentative.

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1 I think it is perfectly obvious the smaller the commis-
2 sion that's paid to a salesman, the treater the return
3 to the company.
4

5 Why are you spending time on that? Do you
6 need the witness to answer the question?

7 Q I show you this. Did there come a time when
8 you entered into another -- I withdraw that.

9 Did there come a time when another contract
10 was entered into with the same firm, Marco Sales?

11 A I have no idea. Not to my knowledge.

12 Q Were you negotiating for any other contract
13 with Marco at the end of the one-year period?

14 A I was gone from the company at the
15 of the one-year period.

16 Q Was it usual to have a one-year contract with-
17 out a 30- or 60-day cancellation clause on behalf of the
18 defendant?

19 MR. WOLOSKY: Objection, your Honor. It
20 calls for speculation.

21 THE COURT: He may answer.

22 THE WITNESS: I'm sorry, your Honor. Did
23 you say I may answer?

24 THE COURT: You may answer.

25 THE WITNESS: Please repeat the question

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so I have it exactly right.

THE COURT: He probably forgot it himself.

MR. PANISH: I don't know the exact words.

May we have the reporter repeat it, please.

(Question read.)

A I have no idea.

Q Did you see any other contracts that were entered into by the defendant with sales representatives or manufacturers' representatives?

A Yes.

Q You had access to look at those contracts?

A If I wanted to I could have, yes.

Q Did you look at it before you entered into that one?

A No.

Q Didn't you deem it important to look at other ones to see what the cancellation clauses were?

A Mr. Panish, I entered into a letter agreement with a man to sell a product that I was told had a high margin of profit connected with it and whose sales over the past 12 years that we owned the rights to it had at best been minimal. If memory serves me it was in the area of \$100,000 or less. I didn't consider this the most important thing I had to do. I gave him an agree-

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ment to go out and sell as much of this as he could.

I would pay him 30 per cent commission for so doing, and

I might add that he did not keep the 30 per cent entirely.

He was selling to distributors, who had to make some profit themselves, about 15 per cent.

Q Did you have any other dealings with Marco Sales than this agreement entered into on behalf of the defendant?

THE COURT: Now, this agreement, is Marco Sales the same as Marchese?

MR. PANISH: Yes, it is, your Honor.

THE WITNESS: Yes, it is.

Q Did you, sir?

A Any other what?

Q Dealings with March Sales other than the agreement that you signed as an officer of the defendant?

MR. WOLOSKY: What period of time are you talking about?

MR. PANISH: 1973.

A Yes.

Q Did you borrow money from Mr. Marchese?

A No.

Q From his firm?

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A No.

Q In 1972 did you?

A No.

Q Well, I show you this check dated September 11, 1973 in the sum of \$3500, which is to the order of Marco Sales, executed by you.

A Right.

Q And it notes on there repayment.

A Right.

Q Could you tell us what that was in repayment for?

A Yes, I can.

Q Do that, please.

A Yes, I will. Some time in July or August of 1973 Marchese suggested that he and I go into the label business. He was familiar with the label business apparently from having sold a good number of labels while a partner of Martin Packaging. Additionally they had a label operation of their own.

We talked at great length about it and we decided we would become partners. We had partnership papers drawn up by my attorney, whose name is John Connolly of Connolly & Pierce, I believe, in Manasquan, New Jersey.

Subsequent to my sending Marchese the papers

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1 and prior to sending him back his money which was to
2 be used as a down payment, his half of the first third
3 down payment on the label press, he found that he was
4 under a restrictive covenant in his termination or his
5 dissolution with his partnership with Martin Packaging.
6

7 That covenant or that restriction was that
8 he could not sell or be associated with a label
9 manufacturer or a competitor to Martin Packaging within
10 a 100-mile radius. He had thought it was 50 when we
11 were talking about it. It seems that Neptune, New
12 Jersey falls into the 75- or the 100-mile radius.

13 He brought this to my attention. We talked
14 about it. I got the very strong indication that maybe
15 he wasn't as sincere about going through with this
16 venture as he might have been. This money that he
17 gave me, this \$3500, was matched by an equal amount of
18 mine and sent to the Manhasset Machine Company in Aity-
19 ville, Long Island as the first down payment on a piece
20 of equipment that they were to build for us.

21 So that is the extent of that.

22 Q Did you continue in this business of Encore
23 through the end of 1973?

24 A Yes.

25 Q And were you also in it in 1974?

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2 A Not all of '74.

3 Q Until what date?

4 A I believe it was around August. I
5 think I had to be out of the building by the 1st of
6 September. I think it was the end of August.

7 Q But you continued from the beginning of '74
8 at least until April 5, 1974, is that a fact?

9 A Yes.

10 Q Did you keep records?

11 A Yes.

12 Q In connection with your earnings for that
13 period of time?

14 A Yes.

15 Q And where are those records?

16 A You have them.

17 Q You mean these books?

18 A Right.

19 Q Now, will you look at these books for a moment,
20 please, and tell us what your earnings were from January
21 1, 1974 to April 5, 1974?

22 A I don't believe I could tell from here,
23 frankly.

24 Q Well, doesn't that indicate the amount of
25 sales?

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A Yes, but it doesn't say anything about profit.

Q Does it say anything about purchases?

A I would expect it might. I don't know.

Q Tell us what it says on sales first?

A On sales?

Q Yes, sir.

A Total sales?

Q For that period of time.

A Well, I don't know, Mr. Panish, what time frame this thing is written in. If you are saying this is the 1974 sales journal, it says 34,700 -- I'm sorry -- \$3474.38, on this page.

Q Well, you kept that book in your business?

A No, I didn't; my wife did.

Q She kept it under your direction?

A That's not really true either. She kept it.

Q That's a false statement, sir.

THE COURT: Now, please, we don't have a jury here and that's a nonsensical statement, really it is.

Q What is the total sales for that period?

A Well, I am telling you, Mr. Panish, I can't

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2 tell from here. Up on the top it says "April,
3 1974." It says -- well, it's not totaled. The sales
4 aren't totaled. This says "March, '74." It does
5 not say -- I don't see January -- yes, January and
6 February are in here but they are not totaled. Mr. Panish.

7 Q Let me ask you this: Did you not file a
8 New Jersey quarterly tax return for the first quarter
9 of 1974?

10 A I'm sure I did.

11 Q Do you have a copy of that?

12 MR. WOLOSKY: Your Honor, I am going to
13 object to this. The witness says he can't make any
14 determination from the documents that have been placed
15 in front of him. If Mr. Panish has the remedies of
16 the Federal Rules of Civil Procedure --

17 THE COURT: This all should have been done
18 before the trial.

19 Do you have any information before you on
20 which you can figure out or compute the amount of income
21 you received from that transaction from January 1 to
22 April 5, 1974.

23 THE WITNESS: Only if I added up all of
24 these, your Honor, I would get a total sales figure.

25 THE COURT: That isn't the question I asked

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you. My question was do you have any information in front of you, any document, book or record, that would show the income you derived from that source?

THE WITNESS: No, sir.

THE COURT: Objection sustained.

Let's move on.

Q Do you have any source to show the income you derived from 1974?

THE COURT: I don't understand that question. Derived from whom and what period in 1974?

MR. PANISH: Derived from his business.

THE COURT: You have some of these figures.

Mr. Panish, it is perfectly clear that the Rules of Federal Procedure are intended to afford you the opportunity to probe into what you are now seeking to do at the trial. This all should have been done before the trial.

Put your next question, please.

Q Subsequently, did your business terminate in August of '74, I think you said?

A Yes.

Q Since that date what have you been doing?

MR. WOLOSKY: Objection, your Honor.

Irrelevant.

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THE COURT: Sustained.

Q Are you still in business?

MR. WOLOSKY: Objection, your Honor.

THE COURT: Sustained.

Q Were you employed by anyone else, aside from your association with your own firm, Encore, in the first three months of 1974?

A I am trying to recall.

Yes.

Q By whom?

A Nopi, N-o-p-i.

Q What capacity?

A I was a consultant for them.

Q During what period of time?

A It ran, I believe, to June or May. May, I believe. I'm not sure.

Q And what was your income from that firm?

A A thousand dollars a month.

Q Were you employed by any other firms?

A Not during that time, no.

THE COURT: Does that mean that from January to the end of March 31st you got \$3000 from that source?

THE WITNESS: That would be 4000, your Honor, the first four months.

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1 THE COURT: January through March is
2 three months, is it not?
3

4 THE WITNESS: I'm sorry. Yes.

5 THE COURT: Nine days in April would be
6 approximately a third. That would be about another
7 \$333.

8 THE WITNESS: Yes.

9 Q Now, what services did you perform?

10 A I have assisted them in setting up sales
11 territories and so forth.

12 Q Where were they located?

13 A Hackensack -- the home office is Copenhagen,
14 Denmark.

15 Q And their United States office?

16 A It was in Hackensack at the time. I forget
17 where it's at now.

18 Q What territory did you set up?

19 A Well, it wasn't a matter of setting one terri-
20 tory, it was outlining -- they were seeking my counsel
21 on how many men they should hire, where they should first
22 put them, that type of thing.

23 Q Did you obtain any customers for them?

24 A No.

25 Q Did they ask you to?

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THE COURT: Objection sustained.

Q Did you do all your work in their office or were you also out --

THE COURT: Mr. Panish, that doesn't make any difference at all. The issue is whether or not he had a source of income and exerted his best efforts in order to obtain income. You have the figure now. Whether he did his job competently or incompetently is utterly immaterial, whether he worked on the first floor or sixth floor.

Q Did you work for them in 1973?

A Yes.

Q During what period of time?

A I believe it started in July; July or August, possibly.

Q And was your income the same?

A Well, there was \$5000 in a flat fee plus \$1000 a month.

Q So how much did you earn from that firm in 1973?

THE COURT: You mean after April 9, 1973.

MR. PANISH: Yes, to the end of that year.

A I think the total, if I'm not mistaken, was \$5000 plus nine months at \$1000 a month.

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1 THE COURT: Didn't you inquire of this
2 witness during the course of the deposition?
3

4 MR. PANISH: Yes. He denied that he
5 had any such income.

6 THE COURT: All right. You say he denied
7 it and I'm allowing you to question him about it.

8 MR. WOLOSKY: I might say this is all
9 contained in the witness' tax returns. For the year
10 1973 it was contained in the witness' tax returns which
11 are in evidence.

12 Q Now, were you employed by any other firm be-
13 sides Nopi in 1973?

14 A I served as a consultant in Italy.

15 Q Which firm?

16 A W. R. Grace.

17 Q Did you actually work in Italy?

18 A Yes.

19 Q For how long a time?

20 A I believe it was 14 days, if I am not mistaken.

21 Q What was your compensation for that?

22 A \$600 a day..

23 Q For 14 days, sir?

24 A Yes.

25 Q And do you recall what month or months that

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1 took place?

2 THE COURT: Were your expenses paid?

3 THE WITNESS: Yes, your Honor.

4 THE COURT: So that's \$600 a day net?

5 THE WITNESS: Yes, sir.

6 Q Did you do any consultation or any other
7 work for any other firm in 1973?

8 A Not that I can recall. If I could look
9 at my tax return I could probably tell better.

10 THE COURT: Show him his tax return and
11 let him refresh his recollection.

12 THE WITNESS: This doesn't show the names
13 of the people. It shows a gross amount. But
14 there is one for 10,800 -- I can't really tell what all
15 this is, unless I'm not finding the right page.

16 I believe I have named them all, though I
17 am not sure.

18 I can't find it, your Honor.

19 THE COURT: Put your next question, please.

20 Q When you received that sum of money from Man-
21 co tell us what services you rendered?

22 A I sold black vinyl tape for them on a commis-
23 sion basis.

24 Q And was that to any similar or the same
25

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customers of the defendant.

MR. WOLOSKY: Objection to the form of the question, also to the substance, your Honor.

THE COURT: Sustained as to form.

Q Well, as president of the defendant you had a good knowledge of all their customers, did you not?

A I had the good knowledge of the customers long before I became president of Technical Tape.

Q You were in sales and marketing for several years before that?

A That is correct.

Q And you don't recall at this time whether they were the same customers that Tuck was selling to?

A I didn't say that.

Q Was W. Evans one of the Tuck customers?

MR. WOLOSKY: The question has been asked and answered on more than one occasion, your Honor. I object.

THE COURT: He may answer again.

Answer, please, and move along.

THE WITNESS: I'm sorry, your Honor, I didn't understand.

Was W. Evans a customer that I sold Manco products to, was that the question?

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Q Was that one of the defendant Tuck's customers?

A It may have been.

Q At the time you were an officer there?

A I don't know. I'm not sure that it was but I believe it may have been.

Q Wasn't that one of the big customers?

A I don't recall that it was particularly big.

Q You don't recall speaking to anyone from W. Evans during your employment with the defendant?

A During my employment with the defendant? No, I don't believe I ever did.

Q Do you know the firm Horizon Brands Corporation?

A Yes.

Q What do they sell?

A They were the retail selling arm for Tuck Industries.

Q Did there come a time when a contract was entered into by the defendant with them in 1972?

THE COURT: Who is the "them"?

Q Horizon Brands Corporation and the defendant Tuck Industries.

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A Yes.

Q And you executed that contract on behalf of the defendant?

A I believe I did, yes.

Q I show you this contract which states it was entered into January 17, 1972. I believe on the next-to-the-last page or the last page it contains your signature (handing).

A Yes.

MR. PANISH: I offer that in evidence, if your Honor please.

MR. WOLOSKY: No objection, your Honor.

(Defendants' Exhibit J was received in evidence.)

Q Now, that contract, Mr. Gavin, contained a certain progression of commissions, is that so?

A Yes.

Q And I believe on the initial scale there was a commission which called for 6-1/4 per cent.

MR. WOLOSKY: I believe the contract will speak for itself.

THE COURT: Yes. Objection sustained. It does speak for itself.

Q Now, after that contract was entered into did

1 there come a time at the end of 1972 that you started
2 to negotiate another contract with Horizon Brands?
3

4 A Yes.

5 Q And when did you start negotiations?

6 A I would imagine it was around October,
7 maybe November.

8 Q And did that continue to the end of that
9 year?

10 A Yes, it did.

11 Q Did it also continue into the beginning of
12 1973?

13 A Yes, it did.

14 Q Now, did there come a time in 1973 when you
15 received a certain telegram from Horizon Brands concern-
16 ing the contract for the year 1973?

17 A Yes.

18 Q Do you recall when you received the tele-
19 gram?

20 A Not specifically, no.

21 Q Do you remember the month and the year, or
22 the month of 1973?

23 A I would imagine it was March, I would guess.
24 I don't really remember. February or March.

25 Q Now, when you received that telegram you were

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Gavin-cross

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1 in the New Rochelle office, were you?

2 A Yes.

3 Q Do you recall what the contents of that
4 telegram were?

5 A Yes.

6 MR. WOLOSKY: I am going to object, your
7 Honor. The contents of the telegram would speak for
8 itself.

9 THE COURT: Do you have the telegram?

10 MR. PANISH: We don't have it, your Honor.

11 Do you know what happened to that telegram?

12 A I have no idea. I gave it to my secretary,
13 I imagine.

14 Q Did you ever communicate its contents to Mr.
15 Sprayregen about it?

16 A Yes.

17 Q In person or by telephone?

18 A By telephone and in person, I believe.

19 Q Were you up at the office at 200 Park Avenue
20 in connection with the final negotiations on this Horizon
21 '73 contract?

22 A Yes.

23 Q And do you recall you were waiting there for
24 Mr. Sprayregen?
25

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A Yes.

Q And isn't it a fact that in the waiting room there was also Mr. Degnan?

A I don't recall Mr. Degnan being there.

Q Did you speak to him about the telegram before you went in to see Mr. Sprayregen?

A I don't believe the telegram arrived when we were at the Pan Am Building. It was up in New Rochelle that I first got it.

Q Had you already received the telegram prior to the time you went to the Pan Am Building?

A No. The telegram was sent that afternoon, if I'm not mistaken.

Q When were you apprised of its contents for the first time?

A The day I got it.

Q Do you recall the date?

A I have no idea.

Q Was it before or after the Horizon second contract was signed?

A I believe it was before. I don't think there was a second contract signed during my tenure.

Q Do you know --

A You would have that, Mr. Panish.

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Q Do you know who was negotiating this second contract besides yourself?

A Largely Mr. Sprayregen, Gerry Sprayregen.

Q Did you later learn or learn at any time what the commissions were in respect to this contract between the defendant and Horizon Brands?

MR. WOLOSKY: May I have that question read back.

(Question read.)

MR. WOLOSKY: Your Honor, the two contracts would speak for themselves. Whatever the commissions are are in the contract.

THE COURT: It is totally vague but I will let him answer it.

MR. WOLOSKY: I am going to object to the form also.

THE COURT: You may answer.

A The two contracts could not be held as comparable in any fashion when dealing with the percentage of commission paid because they were two completely different consents under which the contract was founded.

Q Do you recall whether the contract was sent prior to the time that the second Horizon agreement was executed?

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2 MR. WOLOSKY: I object.

3 THE COURT: What contract are you referring
4 to?

5 MR. PANISH: There is another contract. I
6 am getting to it.

7 THE COURT: Get to it because the question
8 is quite unclear to me. Maybe you have something in
9 mind but I can't follow it.

10 There was a written contract which is in
11 evidence now. That's Defendant's Exhibit J. Now,
12 what contract are you referring to?

13 Q Now, Mr. Gavin, I show you this contract which
14 states to be as of January 1st, 1973. (handing).

15 I ask you whether you are familiar with it,
16 whether you can identify it?

17 A No, I don't believe I ever saw this in its
18 finished form.

19 Q You participated in its negotiations?

20 A To the extent that Mr. Sprayregen would allow
21 me, yes.

22 Q You say you communicated the contents of the
23 telegram to Mr. Sprayregen at the Pan Am Building when
24 you were there and met Mr. Degnan?

25 A I didn't say that.

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Gavin-cross

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Q On the telephone?

MR. WOLOSKY: Would you let the witness answer, please.

MR. PANISH: I'm sorry.

MR. WOLOSKY: I am going to ask that he be required not to answer that question because it is contrary to the testimony of the witness previously that he doesn't recall Mr. Degnan being at the Pan Am Building.

THE COURT: You may answer the question.

THE WITNESS: Read the question back.

THE COURT: Did you have any discussion at all with Mr. Sprayregen about a telegram that's been referred to?

THE WITNESS: Yes, your Honor, but not at the Pan Am Building.

Q Where did it take place?

A New Rochelle, New York, on the phone.

Q What did you say to him and what did he say to you?

A He was calling from a phone booth, or that's what he told me he was doing. I told him that these things -- that is, the negotiation with Horizon Brands -- had dragged on to a point where they were ready to drop

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2 everything and go get another line or do something
3 else; at least that was their threat.

4 I told him that I got a telegram giving us
5 I believe until the next day -- I'm not really sure it
6 was the next day or what day it was -- and he said,
7 "Don't worry about it, I'll be up there in a while."

8 He came up and when he came into the office
9 the whole topic of conversation was the Horizon contract
10 and I recall specifically him saying something to me that
11 I wouldn't have expected he would say. That is,
12 when he was in the phone booth and knowing of this pres-
13 sure and everything on this thing and it was very important,
14 he said he was actually shaking but he couldn't let these
15 people muscle him, or words to that effect, that he
16 wouldn't be pressed or pressured into doing anything.
17 While he was concerned with the importance of it, none-
18 theless he was a good negotiator and was not going to
19 let them pressure him.

20 Q You say he was at the New Rochelle office
21 during that conversation with you?

22 A Yes.

23 Q Did you show him the telegram at that time?

24 A I believe I did. I may have.

25 Q Then what did you do with it?

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1 A I really have no idea. I probably filed
2
3 it, I would imagine, or had it filed.

4 I might add, if I may, that the telegram,
5 at least as far as I can determine, was secondary to the
6 fact that everybody knew, everybody that was concerned
7 with the negotiations were convinced that these two
8 people, that is, the principals of Horizon, were getting
9 very impatient. They were issuing all sorts of veiled
10 threats and some threats that were not so veiled and
11 we were aware of the fact that it was important to us.
12 We did want to get on with the signing of the agree-
13 ment because we didn't feel that they were really selling
14 to their best capabilities if they didn't believe they
15 were going to be retained for the following year. So
16 the matter of the negotiations with Horizon was very,
17 very important and everybody connected with it was very
18 much aware of the fact that it was important.

19 Q Did the telegram contain a threat from
20 Horizon?

21 MR. WOLOSKY: I object to that.

22 THE COURT: Do you recall the contents of
23 the telegram?

24 THE WITNESS: Yes, your Honor. They said
25 in essence either we sign an agreement --

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1 THE COURT: Within the next 24 hours?

2 THE WITNESS: Something like that or
3 consider it cancelled, or words to that effect. I
4 really don't recall. But that was the gist of it.
5

6 Q In relation to that telegram do you know
7 when the second contract was signed with Horizon, the
8 '73 agreement?

9 A No, I don't. I don't believe it was signed
10 while I was still there.

11 THE COURT: That means it must have been
12 signed after April, 1973?

13 THE WITNESS: Yes, sir. That or they
14 didn't show it to me when it was signed.

15 Q Now, Mr. Gavin, when you testified at depo-
16 sition in this court on March 11, 1974 were you asked
17 this question and did you give this answer, page 188,
18 line 22:

19 "Q After April 6, 1973 to April of 1974
20 did you have any other employment other than with Encore
21 Tape, the business you were operating?

22 "A No"?

23 Did you make that statement, sir?

24 A Yes, I did.

25 Q And during that time you had already been

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employed by the firm Nopi you mentioned a few minutes ago?

MR. WOLOSKY: During what period of time are you referring to?

Q When you were examined in this court in March, 1974.

A Well, I had not been employed as a salaried employee, no.

Q You received income?

A Yes, I did. I was advised there was a difference in such matters.

Q You mean whether you call it a salary or wages or whether you call it commission?

THE COURT: No, between being engaged as a consultant and being regularly employed. That's what the witness is saying. It's perfectly simple.

I take it you questioned him as to income in the deposition.

MR. PANISH: I did, sir.

THE COURT: Let's move on, please.

Q Can you tell us what Spec Tape is?

MR. WOLOSKY: I object to this. This was gone into fully this morning. The witness explained what Spec Tape was. He was questioned on it this morn-

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ing. It is cumulative.

THE COURT: Didn't you go into that this morning?

MR. PANISH: On the income part. Not in connection with the counterclaim.

THE COURT: What's the counterclaim? You don't even know it, you have to consult with somebody.

MR. PANISH: I don't have enough room to keep all the papers up here. I have to get my answer.

(Pause.)

MR. PANISH: The defendants' counterclaim, your Honor, paragraph 39, also on 32, your Honor, 32-I, J, K.

THE COURT: Go ahead. I suppose it's easier to pursue it. I thought you had questioned him about it this morning.

MR. WOLOSKY: That's my recollection, your Honor.

THE COURT: Put your questions, please.

Q Now, did there come a time when an agreement was entered into with Spec Tape.

A With me or with the defendants?

Q With the defendants.

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Gavin--cross

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A Yes.

Q And do you recall when that took place?

A Not specifically, no.

Q Well, was there any price list attached to that agreement that you recall?

THE COURT: I'm not sure I understand. Is this an agreement that was entered into between Spec Tape and the defendants?

MR. PANISH: Yes, and the defendant.

MR. WOLOSKY: If Mr. Panish has the agreement, let him produce it.

THE COURT: Where is the agreement?

Q With the exception of the price list attached at the end. (handing).

A With the exception of what?

MR. WOLOSKY: Mr. Panish, are you representing that that's an agreement between Spec Tape and the defendants?

MR. PANISH: And Tuck Industries.

THE COURT: What is the date of it?

I'm asking you, Mr. Panish, what is the date of it? Don't you know? I'm trying to move this along. I'll take your statement on it.

THE WITNESS: 6/15/73, your Honor.

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1 THE COURT: That was after the plaintiff
2 was no longer employed by the defendant. What is the
3 point you are making?
4

5 MR. PANISH: Certain negotiations were going
6 on in connection with the price list --

7 THE COURT: This is a contract entered into
8 after he was no longer the president. Is that correct?

9 MR. PANISH: Yes.

10 THE COURT: Tell me what your point is about
11 it.

12 MR. PANISH: All right.

13 THE COURT: This case is getting more
14 remarkable as it goes along in contents and theories.
15 Of course, it is evident to me that the suggestion
16 I made when the application to amend the answer was
17 submitted had quite some substance to it.

18 I have rarely seen a case of this type where
19 there are something like 17 different affirmative de-
20 fenses, or something like that, and any number of
21 counterclaims. There is a typical example right now.

22 I am asking you what your theory was in advanc-
23 ing that.

24 MR. PANISH: That certain customers belong-
25 ing to the defendant were trying to be obtained by this

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1 plaintiff after he left his employment.

2 THE COURT: But the defendant entered into
3 the agreement with the Spec Tape after his employment was
4 no longer in effect.

5 MR. PANISH: I understand, your Honor.
6 Negotiations started then.

7 THE COURT: Go ahead.

8 BY MR. PANISH:

9 Q Now, do you recall the firm Real Tape?

10 THE COURT: What's the name?

11 MR. PANISH: Real, R-e-a-l, Tape.

12 A I recall Reel, R-e-e-l, Tape.

13 Q I stand corrected.

14 Do you know the owner of that firm?

15 A Yes.

16 Q Who is that?

17 A Mr. Joseph Leifer.

18 Q How long have you known him?

19 A I believe I first met him in '65 or '66.

20 Q Now, during your employment with the defend-
21 ant did you enter into any agreements with Mr. Leifer
22 of Reel Tape?

23 A I believe I did, yes.

24 THE COURT: Does that mean on behalf of
25

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Gavin-cross

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1 the defendant?

2 MR. PANISH: On behalf of the defendant,
3 yes.

4 Q Was that on an oral or written agreement?

5 A I don't really recall. I believe it was
6 written. I'm not sure.

7 THE COURT: Do you have the agreement?

8 MR. PANISH: No, I don't. My information
9 is that it was oral, your Honor.

10 THE WITNESS: Then it was oral.

11 Q Did you at any time receive any commissions
12 personally from Reel Tape?

13 A Absolutely not.

14 Q At no time?

15 A No time, ever.

16 Q Do you still reside in New Jersey?

17 A Yes, I do.

18 Q Do you have a condominium in Florida?

19 MR. WOLOSKY: Objection.

20 THE COURT: I don't know what that has to
21 do with this case, if he has one in Florida or any other
22 place. Objection sustained.

23 MR. WOLOSKY: If he had one in Florida he
24 would probably be there now.
25

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Gavin-cross

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THE COURT: No, he wouldn't because I ordered the case to proceed today.

Q Did you at any time visit with a firm called Tape Specialists after the employment with the defendants?

A Yes.

Q Did you try to obtain them as a customer?

A No.

Q Did you try to obtain them as a customer on behalf of Spec Tape?

A No.

Q On behalf of any other firm?

A I may have tried to sell them some vinyl tape. I believe I did try.

Q In what capacity?

A In my own capacity.

Q You mean for Encore Tape & Label?

A Yes.

Q And did you also pursue other firms on behalf of Encore Tape & Label?

A Yes.

Q Was Tape Specialists one of the customers of the defendant Tuck Industries?

A Yes.

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Gavin-cross

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Q And was Moore Paper Company such a customer?

3

MR. WOLOSKY: Customer of whom?

4

MR. PANISH: Of Tuck Industries.

5

A They may have been.

6

Q Did you contact them?

7

A Yes.

8

Q Did you try to obtain business from them for

9

your own personal business after the employment with the
defendants?

10

11

MR. WOLOSKY: I would like to note my objec-

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tion on the grounds there has been no proper foundation

13

for this testimony. The witness has denied any

14

restrictions on competition after the employment, if

15

there was in fact any, and plaintiff -- defendant has

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not produced any agreement restricting his activities

17

after his employment. I am informed that it is not even

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pleading, no restrictive covenant is pleaded in the

19

counterclaim. Unless there is some foundation for

20

this line of questioning I would object to it.

21

THE COURT: Your objection is overruled.

22

If it is taken without substance it will be overruled.

23

Q You may answer.

24

A I forgot the question.

25

Q Referring to Moore Paper Company.

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Gavin-cross

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1 A Did I try to solicit business from Moore
2 Paper Company for Encore, yes.

3 THE COURT: I take it you tried to solcit
4 business from customers.

5 THE WITNFSS: Yes.

6 THE COURT: He admits it.

7 And they were customers of Tuck Industries?

8 THE WITNESS: Not confined to Tuck In-
9 dustries. They had competitive brands of tape. The
10 solicitors I had soliciting for me would have 3M, Mystic,
11 Tuck, any number of brands.

12 THE COURT: When you went out on your own
13 you attempted to get business, you solicited customers
14 in the general trade?

15 THE WITNESS: Yes, sir.

16 Q When you went to solicit Tape Specialists
17 was that on behalf of your own business, Encore Tape?

18 A It worked out that way, yes.

19 Q Did you pay the expenses yourself?

20 A No, I did not.

21 THE COURT: What difference does it make?

22 MR. PANISH: A question of credibility.

23 Q Who did pay the expenses?

24 A Spec Tape.

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Gavin-cross

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2 Q They paid the expenses for you to solicit
3 business on your own?

4 A I didn't say that.

5 Q Tell us what you meant then.

6 A When I went out to Tulsa, Oklahoma to solicit
7 Tape Specialists I did so in conjunction with a trip to
8 Kansas City to see W. Evans, and I believe it was in
9 conjunction also with the trip to Omaha to see Carlson
10 Stapler and Nogg Brothers. When I arrived in Tulsa,
11 Oklahoma to discuss the Spec Tape arrangement with
12 Gary Cameron, who was, to the best of my information, the
13 principal to be talked to, I found that he himself had
14 put together a program which was very similar to the
15 Spec Tape program and therefore was no longer a prospect
16 for Spec Tape. I did not know that until I got to talk
17 to him, at which point it was fruitless for me to
18 attempt to solicit him as a Spec Tape prospect. Further-
19 more, since he had this other program I wouldn't have
20 bothered to divulge what Spec Tape's program was since
21 he was not a valid prospect.

22 Q Mr. Gavin, on the agreement you had with
23 Manco, what was Mr. Kahl, you mentioned Mr. Kahl and Mr.
24 Anderson?

25 A Kahl.

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Gavin-cross

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Q Kahl and Mr. Anderson.

A I didn't mention Mr. Anderson.

Q You mentioned Mr. Kahl?

A Yes.

Q Now, that company was selling to an account called Gem Tape, is that correct?

A At one time, yes.

Q In connection with those sales were certain commissions paid by the defendant to Manco on the sales to Gem Tape?

A I don't believe it was paid during my tenure, no.

Q Well, do you recall them receiving a 5 per cent commission?

THE COURT: Who is "them," please?

Q Do you recall Manco receiving a 5 per cent commission on the sales that were made to Gem Tape in 1972?

A I made an arrangement with Manco and I will explain the basis under which it was done.

Jack Kahl called me and told me that he had a customer whom he could no longer sell because he could not make a profit in so doing, but that he would give me that account if I would pay him a finder's fee.

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1 rda Gavin-cross 194

2 I said, "Fine, Who is it?"

3 First off, we arrived at 5 per cent. I

4 said, "Fine. Who is it?" It turned out to be Gem

5 Tape. To the best of my knowledge, Technical Tape

6 had never sold Gem tape before. I'm sure we could

7 have sold them direct had we been able to find them.

8 But he turned the account over. He told us what the

9 selling price was, that is, he told me what the selling

10 price was, and why he could no longer afford to

11 service the contract.

12 I gave him no written document, at least

13 not to my recollection, covering the 5 per cent, but I

14 had known him a long time and I felt that it wasn't

15 necessary, nor did he.

16 To the best of my knowledge, the 5 per
17 cent that I promised him as a finder's fee for that account
18 was never made while I was president of Tuck Tape.

19 Q But it may have been paid afterward?

20 A If you chose to honor the agreement it would
21 have been paid.

22 Q You say you have no knowledge that Tuck
23 industries was selling directly to Gem before you made
24 this agreement?

25 A I have no knowledge that Gem Tape was a custo-

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Gavin-cross-redirect

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mer of Technical Tape prior to being sold by Manco.

MR. PANISH: I have no more questions.

THE COURT: Any redirect?

MR. WOLOSKY: Yes, your Honor, I would have some.

THE COURT: Get started on it. You have five minutes.

REDIRECT EXAMINATION

BY MR. WOLOSKY:

Q Mr. Gavin, for how long prior to your employment by the defendants in this action were you employed in the pressure sensitive tape business?

A A total of some 14 years.

Q And you had worked for companies, had you not, that manufactured pressure sensitive tape?

A Yes.

Q And had those companies sold through distributors?

A Yes.

Q And did Technical tape also sell through distributors?

A Yes.

Q Was there any secret in the industry as to who the distributors of pressure sensitive tape were?

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Gavin-redirect

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A No. That's common knowledge to anyone in the business.

Q And I take it that you gained familiarity with the distributors of pressure sensitive tape prior to the time that you became employed by Technical Tape?

A Yes, I did.

Q And was Evans & Company a distributor of pressure sensitive tape?

A Evans & Company was a distributor of pressure sensitive tape for many, many years and they were my customer or a customer of mine when I was at Mystic Tape. I first became acquainted with them in 1965.

Q And did Evans & Company also sell other brands of pressure sensitive tape?

A Yes, they did: 3M, I believe they handled Permacel at one time, they may have sold some Tuck. Apparently they did.

Q Would the same be true of Carlson Stapler?

A Yes. The manager of Carlson Stapler was a former employee of mine whom I hired, and when I promoted him to regional manager Carlson hired him away before I could get him moved.

Q Would the same be true of Nogg Brothers?

A I have known them since 1965.

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Q Would the same be true of Tape Specialists?

A Tape Specialists I first became acquainted with just prior to leaving Technical Tape.

Q But have they been known in the industry as a distributor of pressure sensitive tape?

A Yes, they were.

Q Anything secret about their business?

A The name itself would indicate the business that they are in.

Q Was there anything secret about the fact that they purchased and distributed pressure sensitive tape?

A No, sir.

Q Same thing be true of American Paper & Supply?

A Yes, sir.

Q Would the same thing be true of Reel Tape?

A Yes.

Q Would the same thing be true of Moore Paper Company?

A Yes.

Q Would it be true of virtually every distributor of pressure sensitive tape?

A Yes.

Q Now, you mentioned that these distributors

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1 of pressure sensitive tape would distribute more than
2 one brand of tape.
3

4 A Yes, they do. Most of them do.

5 Q If Technical Tape was distributing through
6 a particular distributor would it give the distributor
7 its price list?

8 A Certainly.

9 Q And would the other manufacturers of pressure
10 sensitive tape also give the distributor their price
11 list?

12 A Certainly.

13 Q And when the distributor went to solicit a
14 customer, would it be able to quote the various prices?

15 A That is correct.

16 Q Is there anything secret about the prices?

17 A No. As a matter of fact, I was on their
18 mailing list long after --

19 THE COURT: Whose mailing list?

20 THE WITNESS: That is, Technical Tape's
21 mailing list, long after I was separated from the com-
22 pany.

23 Q And if you wanted to know who to solicit for
24 distributing pressure sensitive tape couldn't you look
25 in the Yellow Pages?

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1 rda Gavin-redirect 199

2 A Yes, you could.

3 Q And were there any trade journals you could
4 look in?

5 A Yes.

6 THE COURT: Mr. Wolosky, I think we will
7 take our adjournment for the day now.

8 MR. WOLOSKY: Thank you, your Honor.

9 THE COURT: Gentlemen, we will start to-
10 morrow morning at 9:30. We will probably sit until
11 about 1:30. I have a motion calendar at 2:15. I
12 will tell you at that time when we will resume tomorrow.
13 Be prepared to stay a little later tomorrow than the usual
14 hour.

15 Good night all.

16 (Adjourned to January 7, 1975, at 9:30 a.m.)

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2 John A. Gavin

3 v

73 Civ. 2120(EW)

4 Technical Tape, Inc. and
5 Tuck Industries, Inc.

6

NEW YORK, NEW YORK

7

JANUARY 7, 1975

8

9:30 a.m.

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(Trial resumed.)

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12

(In open court.)

13

J O H N A. G A V I N, resumed.

14

REDIRECT EXAMINATION (Continued)

15

BY MR. WOLOSKY:

16

Q On your cross examination I believe you stated you

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had stock options to purchase stock of Technical Tape, Inc.

18

A Yes.

19

Q Did you ever exercise any of those options?

20

A No.

21

Q I believe you also said that you received a bonus.

22

A Yes.

23

Q Of \$10,000 while you were senior vice president;

24

is that correct?

25

A That is correct.

26

Q I show you Plaintiff's Exhibit 5, which is the

1 rdb 2 Gavin-redirect

2 Technical Tape proxy statement dated June 28, 1972 and
3 I ask you whether your bonus and your stock options are
4 fully revealed and set forth in that proxy statement?

5 A Yes.

6 Q And what page are those revealed at?

7 A On 6 and 7.

8 Q Thank you.

9 THE COURT: May I see that, please?

10 MR. WOLOSKY: Yes, your Honor.

11 THE COURT: Proceed, please.

12 Q Mr. Gavin, on cross examination you also mentioned
13 that you were a stockholder of Technical Tape.

14 A That is correct.

15 Q How many shares of stock did you own?

16 A 100.

17 Q Mr. Gavin, before you were hired by Technical Tape,
18 during your interview with Mr. Sprayregen did you fully
19 explain to Mr. Sprayregen your background?

20 A Yes.

21 Q Did you explain to him that you didn't have any
22 experience in the bedspring business?

23 MR. PANISH: I object to this.

24 THE COURT: Well, you went into the bedspring
25 business, so I will allow the question.

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Gavin-redirect

2 A Yes.

3 THE COURT: Of course, I think it is fair to as-
4 sume that before a man was engaged there was inquiry made
5 with respect to his qualifications, background, experience.
6 I don't know why either side is spending so much time on
7 it. It would be a remarkable thing if a man were employed
8 without any knowledge of his background, training and
9 experience and his limitations.

10 MR. WOLOSKY: The only reason I am inquiring into
11 it now is because of the inquiry on cross examination.

12 THE COURT: Finish it. Don't spend more time.

13 MR. WOLOSKY: I have two more questions in that
14 area.

15 Q Mr. Gavin, while you were employed by Technical
16 Tape, who ran the Steadley Company?

17 A Roger Lawrence.

18 Q And before it was acquired, before Steadley was
19 acquired by Technical Tape do you know who ran Steadley?

20 A Roger Lawrence.

21 Q Thank you.

22 THE COURT: You may step down.

23 MR. WOLOSKY: I have more questions.

24 TEH COURT: I thought you said you had two more
25 questions.

rdbr 4 Gavin-redirect

MR. WOLOSKY: Two more questions in that area.

THE COURT: I told him to step down because you said you had two more questions.

Q Mr. Gavin, I believe you stated that you met with Mr. Don Silvestri during the week of April 2, 1973?

A That is correct.

Q How was that meeting arranged?

A Mr. Silvestri called me and told me that Mr. Sprayregen had asked him to come on up and talk to me about the Moran problem.

Q And did he tell you that he was going to speak to you at the request of Mr. Sprayregen?

A Yes.

Q Mr. Gavin, I show you Defendants' Exhibit F and I ask you whether that check was received by you for expenses that you incurred prior to April 9, 1973?

A Yes, I believe it was.

Q And I show you Exhibit G and I ask you whether that was received by you for vacation pay and salary accrued prior to --

MR. PANISH: I object. He is leading his own witness, your Honor.

THE COURT: Yes.

Ask him what it was for.

1 rdbbr 5 Gavin-redirect

2 A Well, Exhibit G --

3 THE COURT: What is the amount of that check?

4 THE WITNESS: Your Honor, if I may, they are so
5 close, I don't know which is which. But in any case, one
6 is for expenses reimbursed for that spent before April 6th,
7 and the other is for vacation pay and any income accrued
8 prior to April 6th.

9 Q Thank you. Mr. Gavin, I believe you stated that
10 you entered into a contract on behalf of Technical Tape with
11 Marco Associates?

12 A Marco Sales, that is correct.

13 Q What item were they selling?

14 A The Tuck automatic labeler.

15 Q Did Technical Tape prior to Marco Sales have
16 a company that was selling the automatic labeler?

17 A Yes.

18 Q And what was that company?

19 A Herbert Lemers.

20 Q And do you know the commission rate that Herbert
21 Lemers was receiving?

22 A Yes. To the best of my recollection it was in
23 the area of 40 per cent.

24 Q Thank you.

25 Mr. Gavin, I believe you stated on your cross

1 rdbbr 6 Gavin-redirect

2 examination that you had received after April 9, 1973,
3 \$14,000 from Nopi.

4 A That is correct.

5 Q Was that \$14,000 received -- well, for what period
6 of time was that \$14,000 received for?

7 A 9,000 of it was in 1973 and the balance was in
8 1974.

9 Q And how much of that was up to and including
10 April 9 -- how much of that was received between January 1,
11 1974 and April 9, 1974?

12 A \$3,000 for the first three months and whatever
13 the prorated share is. Call it a third. It would be
14 \$333.

15 Q Now, I show you Defendants' Exhibit H, which
16 is your 1973 tax return. Now, could you tell me from that
17 tax return how much income you received in the year 1973
18 after April 9th from your activities as a consultant?

19 A Approximately \$20,698.

20 MR. PANISH: I didn't hear that, your Honor.

21 THE WITNESS: \$20,698.

22 Q And were there any expenses that you incurred
23 in earning that \$20,698?

24 A Yes. \$753.

25 Q And what was the net amount that you received as

1 rdbbr 7 Gavin-redirect
2 a consultant in the year 1973?
3 A Well --
4 Q I will phrase it again.
5 What was the net amount that you received as a con-
6 sultant in the year 1973 after April 9, 1973?
7 A \$19,945.
8 Q And did you also have another business after
9 April 9, 1973?
10 A Yes.
11 Q And what was that business?
12 A Encore Tape & Label.
13 Q And did you make any profit on that business?
14 A No, I did not.
15 Q And did you report a loss on that business?
16 A Yes, I did.
17 Q And what was the amount of that loss?
18 A \$14,884.
19 Q Now, Mr. Gavin, from your tax return, can you
20 tell me the net amount of the means that you earned in the
21 year 1973 after April 9, 1973?
22 A \$5,061.
23 Q Thank you.
24 Now, in the year 1974 until April 9, 1974, did
25 you have any consulting income apart from \$3,333 that you

1 rdbbr 8 Gavin-redirect

2 received from Nopi?

3 A No.

4 Q Were you still in Encore?

5 A Yes.

6 Q And did you continue to lose money on Encore in
7 1974?

8 A Yes, I did, until ultimately I had to go out of
9 business.

10 Q And from January 1, 1974 until April 9, 1974,
11 what is your best estimate of the amount of the loss that
12 you incurred in Encore?

13 MR. PANISH: I object to that.

14 THE COURT: I will take the answer.

15 Are you suggesting that these losses are deductible
16 from his income?

17 MR. WOLOSKY: Yes, your Honor. We attempted to
18 briefly research that question last night.

19 THE COURT: Give me an authority.

20 MR. WOLOSKY: We believe that a case appearing
21 at 226 New York 1 is authority for the proposition that
22 the losses incurred may be deducted.

23 THE COURT: I will look at the case. I have
24 a doubt about it.

25 Q Mr. Gavin, when you entered into --

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Gavin-redirect

2 THE COURT: He hasn't answered the question.

3 MR. WOLOSKY: I am sorry.

4 A I would have to believe it was in the area of
5 5 or \$6,000.

6 Q Thank you.

7 Mr. Gavin, when you entered into the business
8 of Encore did you enter into that business with the
9 expectation that you would be making money?

10 THE COURT: Do you have to ask a witness
11 that question? You mean he went in the business with
12 the expectation of losing money?

13 How was this business conducted, Encore?

14 THE WITNESS: Was a sole proprietorship.

15 MR. WOLSKY: I have no further questions of the
16 witness.

17 THE COURT: Now, strict recross examination
18 limited to the questions that were put by counsel on
19 redirect. Don't go over anything that was covered
20 yesterday.

21 MR. PANISH: Yes, your Honor.

22 RECROSS EXAMINATION

23 BY MR. PANISH:

24 Q Mr. Gavin, you are familiar with the complaint
25 that you filed in this court?

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A Yes.

Q In your third claim you set forth that you wish to recover the sum of \$12,500 in respect to the net increment income of the fiscal year '72 over '71; are you familiar with that?

A I'd have to see it.

THE COURT: 74 what?

MR. PANISH: 1972 over 1971.

Q You made a claim for \$12,500; is that correct?

A It says the precise amount is unknown.

Q No, before that -- where does it say unknown?

A Here.

Q But you said "exceeds \$12,500". Is that correct, sir?

A It says on information and belief.

Q At the time you filed this complaint which was May 14, 1973, did you submit certain figures to your attorneys at that time in connection with the net income from operations of these companies?

MR. WOLOSKY: Objection, your Honor.

THE COURT: I don't understand the purpose. Did he ask for more money that he is alleging now with respect to the 2-1/2 per cent?

MR. PANISH: The purpose is, your Honor, he

1 rdb 11

Gavin-recross

2 made three different versions in respect to the same
3 thing.

4 THE COURT The figures are here now. Let us go
5 on. Let us not waste time on anything like that. It is
6 an allegation upon information and belief subject to taking
7 the testimony of defendant before trial.

8 MR. PANISH: At this time, if your Honor please,
9 I would like the Court to take judicial notice of paragraph
10 31 of the amended answer.

11 May I read it into the record, please?

12 "At a special meeting" --

13 THE COURT: I don't take judicial notice of a
14 pleading. It is part of a file record. I don't accept
15 the allegations as fact or anything like that.

16 MR. PANISH: In respect to that, your Honor,
17 in respect to paragraph No. 31, when the plaintiff filed
18 its reply --

19 THE COURT: Read whatever you want to read and move
20 on, will you please.

21 MR. PANISH: "At a special meeting of the board
22 of directors of the defendant Technical Tape, Inc., it
23 was agreed that the plaintiff was to obtain an increase
24 in salary from \$35,000 per annum to \$50,000 per annum
25 retroactively Table 4, 1972, and that he was entitled

1 rdbbr 12

Gavin-recross

2 to receive 2-1/2 per cent of the increment of net income
3 from operations for the fiscal year 1971 subject to
4 limitations based upon the earnings of the acquired
5 companies and to certain exclusions as may later be de-
6 termined by the board of directors."

7 At this point, your Honor, I request that
8 judicial notice be taken of a judicial admission to that
9 allegation in that when the plaintiff filed its reply to this
10 amended answer dated July 25, 1974, there is an admission
11 as to that allegation. No denial whatsoever.

12 MR. WOLOSKY: Your Honor, this is a matter
13 for argument in briefs and not a matter for the witness to
14 be questioned on, so I am going to object.

15 MR. PANISH: Further, your Honor, in respect
16 to paragraph --

17 THE COURT: Now, you have the witness under
18 recross examination. Will you please complete that. Limit
19 your recross examination to the subject matter developed
20 on redirect and we will move along with this case.

21 BY MR. PANISH:

22 Q Now, Mr. Gavin, you set forth yesterday that you
23 sent a letter dated April 10, 1973 to the defendant; is
24 that correct?

25 A You will have to repeat the question.

1 rdbbr 13

Gavin-recross

2 Q I say yesterday you set forth that you sent a
3 certain letter to the defendant dated April 10, 1974, do
4 you recall that?

5 A I believe that is correct, yes.

6 MR. WOLOSKY: '73.

7 Q I show you this letter dated April 10, 1973 and
8 ask you if you received this from Mr. Sprayregen and the
9 defendants?

10 MR. WOLOSKY: I object. It is outside the scope
11 of redirect.

12 THE COURT: It is. He wasn't asked any questions
13 on redirect about the letter of April 10th.

14 In going through my papers, your Honor, I find there
15 was such a letter.

16 THE COURT: If you say you overlooked it, that
17 is different.

18 MR. WOLOSKY: Your Honor --

19 THE COURT: Let us receive it. It is a self-
20 serving declaration. It is obvious what it is.

21 Why are we spending time on it? I tried to mention
22 to you yesterday and I am repeating today, that I will
23 only consider relevant material. Without looking at it
24 it is obvious to me it is a self-serving declaration by
25 whoever wrote the letter in response to the letter this witness

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Gavin-recross

2 sent. Certainly not proof of the facts contained therein
3 or the allegations contained therein, more correctly.

4 MR. WOLOSKY: Have you offered that in evidence?

5 MR. PANISH: I did, sir.

6 MR. WOLOSKY: Just note my objection.

7 (Defendants' Exhibit K was received in
8 evidence.)

9 Q Now, in connection with your employment with
10 the defendants did you receive the use of an automobile?

11 MR. WOLOSKY: Objection, your Honor.

12 THE COURT: Objection sustained on the grounds it is
13 not proper recross.

14 Q Now, Mr. Gavin, is it your testimony that during
15 the conversation of April 7, 1973, with Mr. Sprayregen,
16 which is the day after the board meeting, that he told you
17 to come into work on Monday morning.

18 MR. WOLOSKY: Objection, your Honor.

19 THE COURT: Objection sustained. You are going
20 into matters that were covered on cross examination. I told
21 you there would be no repetition.

22 Q Now, do you recall yesterday when I asked you
23 whether you had the quarterly New Jersey Sales Tax return
24 for the first quarter of 1974 and you said you did not have
25 it.

1 rdbbr 15

Gavin-recross

2 Do you recall that?

3 A I believe that is correct, yes.

4 Q I am going to show you this paper and ask you
5 if this is the New Jersey Sales Tax return that you
6 filed with that authority for the first quarter of 1974.

7 A It probably is, yes.

8 Q Now, on that statement that you filed in New
9 Jersey, did you have a net sales figure on which you pay
10 taxes?

11 MR. WOLOSKY: I object unless the document is in
12 evidence.

13 MR. PANISH: I offer it in evidence, your Honor.

14 MR. WOLOSKY: Your Honor, if this is being
15 offered to show a deduction for mitigation of damages, I am
16 going to object to it on the grounds that it does not
17 purport to show income or earnings or net earnings. It
18 just gives receipts, sales receipts.

19 MR. PANISH: And deductions, your Honor.

20 THE COURT: We will take it for what it is
21 worth.

22 (Defendants' Exhibit L was received in
23 evidence.)

24 Q Now, in respect to that document, Defendants'
25 Exhibit L, you reported gross receipts, did you not, of

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1 rdbbr 16

Gavin-recross

2 \$9,876.88, sir?

3 A Yes, that is what it shows.

4 Q You took a deduction in respect to that, sir?

5 A Yes.

6 Q Will you tell the Court what your deduction was?

7 A I have absolutely no idea.

8 Q Is it on there, \$4,310.08?

9 A Yes, it is.

10 Q And you reported net sales of \$5,566.80; is
11 that correct, sir?

12 A Yes.

13 Q It was on that amount that you filed taxes with
14 the New Jersey authorities; is that correct?

15 A Yes.

16 Q Did you report any other loss on that return?

17 MR. WOLOSKY: Objection, your Honor.

18 THE COURT: Where is there a reference to
19 a loss?

20 THE WITNESS: Your Honor, I don't understand the
21 return.

22 MR. PANISH: On redirect, your Honor, he said he
23 had a loss on his business in the first quarter of 1974.

24 THE COURT: Where is there a loss reported
25 on that?

1 rdbbr 17

Gavin-recross

2 MR. PANISH: I will withdraw that question.

3 THE COURT: How does that prove the income that the
4 plaintiff had?

5 MR. PANISH: His income from sales?

6 THE COURT: Yes.

7 MR. PANISH: He reported that and paid sales taxes
8 on the net sales.

9 THE COURT: It is in evidence. Please put your
10 next question.

11 Q Did you also file a New Jersey Sales Tax Quarterly
12 Return for the quarter from 4-1-74 to 6-30-74?

13 A I probably did.

14 Q Now, I show you this document and ask you if
15 this is a copy of the one you filed for your business,
16 Encore Tape & Label.

17 A It says it is. I assume it is.

18 MR. PANISH: I offer that in evidence, please.

19 MR. WOLOSKY: May I see it?

20 MR. PANISH: Yes (handing).

21 MR. WOLOSKY: Your Honor, I am going to object on
22 the grounds previously stated and also on the grounds that
23 it is for a period after the date that the contract would
24 have expired by its terms.

25 MR. PANISH: Part of it is within it, your Honor.

1 rdb: 18

Gavin-recross

2 THE COURT: What is the probative value of it as
3 far as the period we are interested in is concerned?

4 MR. PANISH: It starts on April 1, 1974. His
5 termination would be April 5. There is that one-third
6 differential that we used before.

7 THE COURT: You are talking so fast I can't follow
8 you.

9 Read this back, please.

10 (Read.)

11 THE COURT: That is only five days. How can
12 I figure out the five days there?

13 We come back again to the same problem that
14 has been in this case all along. There has not been a
15 proper deposition inquiry to eliminate all these problems
16 that are now presented at the trial. This is all informa-
17 tion that should have been obtained previously.

18 How can I compute the five days, assuming that
19 there is any probative value to that statement?

20 Put your next question, please.

21 MR. PANISH: May we have it marked for identifi-
22 cation, your Honor, please?

23 THE COURT: Mark it for identification.

24 (Defendants' Exhibit M was marked for
25 identification.)

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1 rdbbr 19 Gavin-recross

2 Q Now, you stated that you arrived or you guessed at
3 a loss to be in your business from April 1 to April 9,
4 1974 from 5 to \$6,000?

5 THE COURT: You have your dates wrong, counsel.
6 January 1st.

7 Q January 1st until April 9, 1974. Do you recall
8 that?

9 A Yes.

10 Q Now, do you have any documents setting forth as
11 to how you computed that estimated loss?

12 A No, I don't have documents. I will, obviously,
13 when the accounts get done. I arrived at the figure largely
14 by having taken the amount lost in 1973. I recognized
15 the fact that the expenses remained about the same and
16 profit didn't get any better. So I assume that somewhere
17 around 5 or \$6,000 would be appropriate for the first
18 quarter.

19 Q But in fact, Mr. Gavin, in respect to your sales,
20 you had no sales during the first quarter of 1973 in this
21 business; isn't that a fact, sir?

22 A In 1973?

23 Q Yes.

24 A Correct. Not '73 to '74 first quarter, Mr.
25 Panish. I compared the loss that I had from the time

1 rdbbr 20 Gavin-recross

2 I started the business, which was the last quarter, and
3 assumed that the losses would be continuing at approximately
4 the same rate. That is how I arrived at it

5 Q When you first started your business, that was a
6 start up new business, was it not?

7 A Yes.

8 Q At that time would you anticipate that your
9 sales would be less during the first three months than
10 during the next several months; isn't that so?

11 A That was my anticipation, yes.

12 Q And you say you submitted some documents to your
13 accountant?

14 A I submitted all documents to my accountant.

15 Q When?

16 A They used to come monthly.

17 Q I am referring to these documents, the
18 first quarter of 1974, when did you submit those to your
19 accountant?

20 A I assume the end of the first quarter.

21 Q Does he still retain those records?

22 A I have no idea.

23 Q Did he ever return them to you?

24 A I don't know that I ever gave them to him.

25 Q What records are you referring to? Can you

1 rdbbr 21 Gavin-recross

2 itemize them, please?

3 MR. WOLOSKY: I am going to this line of question-
4 ing, your Honor.

5 THE COURT: Do you always stand on your feet
6 and I am going to object? Stand up and say I object.

7 MR. WOLOSKY: I object.

8 THE COURT: Objection overruled.

9 A I am referring to the facts that the accountants
10 would come monthly, take off the journals, or whatever,
11 any information they needed to supply the state and federal
12 government with the tax requirements that were set forth.

13 Q And the journal you referred to, are those the
14 two books you produced yesterday?

15 A It would be them or something like them, yes.

16 Q Are there other documents involved?

17 A Not to my knowledge.

18 Q What other books and records did you keep
19 in this business?

20 A I kept those things that the accountants told
21 me were necessary.

22 Q When was the last time you spoke to this accountant?

23 MR. WOLOSKY: Objection, your Honor.

24 THE COURT: Overruled.

25 A About -- well, I called him a few months ago to

1 rdb 22 Gavin-recross
2 give him permission to give my attorneys the books and
3 records, and the time before that was when I closed down the
4 business.

5 Q This few months ago, when was that, sir? Can
6 you fix the month, please?

7 A September, I don't really remember.

8 Q Of 1974?

9 A Yes.

10 Q And since 1974 to the present date is it
11 your testimony that you never spoke to him?

12 MR.WOLOSKY: Objection, your Honor.

13 THE COURT: Answer the question, please.

14 A Yes, last time I spoke to the accountant was the
15 day I called him to give him permission to release the records
16 to Parker, Chapin & Flatow.

17 Q Did he obtain the records for the last quarter
18 of 1974?

19 MR. WOLOSKY: Your Honor --

20 THE COURT: Will you stop objecting so much to
21 matters that are not important. We will save time.

22 A There was no records for 1974, Mr. Panish.
23 I was not in business at the end of 1974.

24 Q Did your accountant inform you that he was under
25 subpoena in this court?

1 rdbbr 23 Gavin-recross

2 A No, sir.

3 Q He never mentioned to you that he received a
4 subpoena?

5 A Absolutely not.

6 Q Did you ever call him?

7 THE COURT: He just said September 1974. Please
8 stop.

9 I am going to confine you to recross examination
10 based on the redirect and I think you have exhausted the area
11 of inquiry. If you have anything that is pertinent
12 based on the redirect examination, put your question. Let
13 us stop this nonsense.

14 MR. PANISH: Yes, your Honor.

15 I have no further questions.

16 I want to mention for the record, if I may, that
17 in respect to paragraph 44 of the amended answer of
18 defendants I would like the Court to take judicial notice
19 by means of a judicial admission that this allegation
20 was admitted and never denied in the reply of the plaintiff
21 dated July 25, 1974.

22 THE COURT: The pleadings speak for them-
23 selves.

24 (Witness excused.)

25 MR. WOLOSKY: At this time the plaintiff would

1 rdbbr 24

2 rest subject to recalling the witness on rebuttal, if necess-
3 ary.

4 We also have one minor amendment to the plead-
5 ings that we would like to urge at this time.

6 It was alleged that Tuck Industries was incor-
7 porated under the laws of Michigan. We now know that Tuck
8 Industries incorporated under the laws of New York.

9 However, that does not destroy the diversity jurisdiction.

10 THE COURT: Any objection to the amendment?

11 MR. PANISH: No objection, your Honor.

12 THE COURT: The amendment is allowed.

13 All right, plaintiff rests.

14 The defendant may go forward.

15 MR. PANZER: Your Honor, the defense at this time
16 reserves on its motion to dismiss, please.

17 THE COURT: Make your motion now.

18 MR. PANISH: At this time the defendants move
19 to dissmis the 4th claim set forth in the complaint of
20 the plaintiff, undated, attached to his summons of May 14,
21 1973, on the grounds that no proof was offered that he
22 is entitled to any 2 per cent of the increment of the fiscal
23 1973 net income over the fiscal 1971 income.

24 THE COURT: Is there any evidence in the case as
25 to that?

1 rdbbr 25

2 MR. WOLOSKY: There was no increase, your
3 Honor.

4 THE COURT: That claim will obviously not be
5 allowed.

6 MR. PANISH: The defendants, your Honor, at
7 this time move to dismiss the plaintiff's first claim
8 as contained in paragraphs 5 through 10 inclusive of his
9 complaint in that therein is set forth that a claim is made
10 for a wrongful discharge, which is wholly inconsistent with
11 the second claim regarding severance pay, and that he cannot
12 at one and the same time recover on both theories.

13 THE COURT: Motion is denied.

14 MR. PANISH: Your Honor, at this time the defendants
15 further move to dismiss the entire plaintiff's case set
16 forth in the record so far in that he has failed to proof
17 a prima facie case.

18 THE COURT: Motion is denied.

19 MR. PANISH: I have no further questions.

20 THE COURT: You may proceed.

21 MR. PANISH: Mr. Degnan, please.
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1 rdbbr 26

Degnan-direct

2 H E R B E R T D E G N A N, called as a witness on
3 behalf of the defendants, after being first duly
4 sworn, testified as follows:

5 DIRECT EXAMINATION

6 BY MR. PANISH:

7 MR. WOLOSKY: Your Honor, at this time I would
8 request if there are any other defendants' witnesses in the
9 courtroom, that they be excused while this witness is testi-
10 fying.

11 THE COURT: Are there any other witnesses?

12 MR. PANISH: There is one witness, your Honor,
13 yes. There is one under subpoena. He is actually a
14 plaintiff's witness but I subpoenaed him.

15 THE COURT: If there are any witnesses in the
16 courtroom, the clerk will show them to the witness room.

17 MR. PANISH: Your Honor, in respect to the
18 subpoenaed witness, may I make a request in order to save
19 time later? He is the accountant for the plaintiff that
20 my co-counsel have an opportunity to examine briefly while
21 he is in the witness room. We have a duces tecum on him,
22 your Honor.

23 THE COURT That is all right. Show the records to
24 him. You don't have to answer his questions. You can wait
25 until you get on the witness stand.

1 rdbbr 27

Degnan-direct

2 Mr. Clerk, show them to the witness room,
3 please.

4 MR. WOLOSKY: Your Honor, may we ask that no re-
5 cords of the plaintiff be shown to counsel which are
6 after April 9, 1974?

7 THE COURT: Yes. The witness has shown him
8 everything already, I think.

9 (Puase.)

10 THE COURT: Are you the accountant?

11 THE ACCOUNTANT: Yes.

12 THE COURT: Have you included in there any
13 papers or records subsequent to April 5, 1974?

14 THE ACCOUNTANT: I don't think so, sir.

15 THE COURT: You are only required to produce records
16 up to and including April 5, 1974.

17 Look at them and see.

18 Yes, do that outside the courtroom. Go into the
19 witness room.

20 BY MR. PANISH

21 Q Mr. Degnan, what is your professional background?

22 A I am a certified public accountant in the
23 State of New York and a member of the New York Bar.

24 Q O you practive law now?

25 A I do not.

1 rdbbr 28

Degnan-direct

2 Q Are you employed by the defendants?

3 A I am.

4 Q And for how long have you been employed by them?

5 A Almost three years.

6 Q Now, what were your first duties with the defend-
7 ants?

8 A I was employed as vice president and chief financial
9 officer of Technical Tape.

10 Q And when did that commence?

11 A May 1, 1972.

12 Q And what is your present position?

13 A I am a vice president of Steadley Co., Inc., a
14 subsidiary of Technical Tape, and president and chief
15 executive officer of Dominion Tape of Canada, which is the
16 Canadian subsidiary of Technical Tape.

17 Q What are your duties now?

18 A My present duties are to manage the Canadian
19 subsidiary and provide financial and management advice
20 to the president of the Steadley Company.

21 Q Were you ever a member of the Board
22 of Directors of the defendants?

23 A I was not.

24 Q Have you had occasion to read the plaintiff's
25 complaint, more particularly the third claim which deals

1 rdbbr 29 Degnan-direct

2 with his claim of 2-1/2 per cent net increment income
3 in fiscal 1972; do you recall that?

4 A Yes.

5 Q Will you state what the fiscal years are for
6 these corporations?

7 A They are on a 52-week basis ending the last week of
8 '71, '72 and '73. I don't recall the precise dates.

9 The financial statements of the company showed that
10 the fiscal year in '71 ended December 25th, the fiscal year 1972
11 ended on December 30th, and the fiscal year in '73 was
12 December 28th -- December 29th, 1973.

13 Q Did you have occasion to read the board minutes
14 of this corporation of April 25, 1973 which was marked
15 Plaintiff's Exhibit No. 3?

16 A Yes, I did.

17 Q I am sorry, '72.

18 And are you familiar with that portion of it
19 which states as to how the net income from operations is to
20 be arrived at regarding the 2-1/2 per cent increment in
21 respect to the plaintiffs entitlement, are you familiar with
22 that portion of the minutes?

23 A Yes, I am.

24 Q Have you read that?

25 A Yes, I have.

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Degnan-direct

2 MR. WOLOSKY: I am going to object to any
3 testimony of this witness regarding the minutes of that
4 meeting because by the witness' testimony he first became
5 employed after that meeting was held and he was not a
6 director.

7 THE COURT: Don't the minutes speak for them-
8 selves?

9 MR. PANISH: Yes.

10 THE COURT: Why do you need this witness then?
11 He wasn't present. All he is going to do is reflect what
12 is contained in the minutes.

13 MR. PANISH: Correct. It is in evidence, your
14 Honor, and I just want to show his familiarity.

15 THE COURT: What was the net income for the
16 fiscal year 1971? I am putting the question to you, sir.

17 THE WITNESS: The net income -- I think I need
18 a more precise question, your Honor. Are you talking
19 about the net income of the tape business, the spring
20 business, the total business combined or segments of it?

21 THE COURT: It would be the net income of
22 Technical Tape, Inc.

23 THE WITNESS: Net income of Technical Tape
24 consolidated in 1972?

25 THE COURT: No, first 1971.

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2 THE WITNESS: 1971, the net income before
3 extraordinary items was 600 -- \$586,125. The net income
4 after extraordinary items was \$1,209,000, as published --
5 as certified by the certified public accountants.

6 THE COURT: What was the net income in 1972 for the
7 fiscal year?

8 THE WITNESS: The net income before extra-
9 ordinary items was \$662,000. The net income after extra-
10 ordinary items was \$1,565,000.

11 As I pointed out, that net income included income
12 from Steadley Company, Inc.

13 Q Were there certain extraordinary items excluded?

14 A Yes.

15 MR. WOLOSKY: I am going to object, your Honor,
16 on the grounds that this witness has no personal knowledge
17 of the facts testified to.

18 THE COURT: Was he the chief financial officer
19 at the time?

20 When were you brought into the company?

21 THE WITNESS: May -, 1972.

22 THE COURT: I will allow him to speak as the
23 chief financial officer assuming he has some knowledge of
24 it.

25 You have the statement and exhibit in evidence,

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2 don't you? Now, why don't you get down, assumedly for the pur-
3 pose you called this witness, with respect to exclusions
4 from the 2-1/2 per cent; I assume that is the reason
5 you called him.

6 MR. PANISH: Yes.

7 THE COURT: Let me see the resolution that you
8 refer to in the minutes of April 29, 1972, or some date in
9 April.

10 MR. PANISH: Here, your Honor (handing).

11 THE COURT: You made the statement a little
12 while ago, if I understood you, that there was a meeting at
13 which action was taken with respect to these exclusions.

14 MR. PANISH: Yes, there was.

15 THE COURT: Where is it?

16 Are those minutes in evidence?

17 MR. PANISH: Not in evidence yet, your Honor,
18 no.

19 Q Now, I show you these minutes of the defendant
20 dated August 22, 1974, and ask you to look at that.

21 (Reading.)

22 Q Have you seen those minutes before?

23 THE COURT: What is the date of that?

24 MR. PANISH: August 27, 1974.

25 THE COURT: '74?

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2 MR. PANISH: Yes, your Honor.

3 Q Have you seen those minutes, Mr. Degnan?

4 A Yes, I have.

5 Q I refer your attention to paragraph -- page
6 No. 3.

7 MR. WOLOSKY: I am going to object --

8 THE COURT: Why don't you learn to say I object
9 instead of I am going to object.

10 MR. WOLOSKY: I object to the witness testifying
11 as to what is in those minutes unless they are in evi-
12 dence.

13 THE COURT: Why don't you offer the minutes in
14 evidence?

15 MR. PANISH: I offer them in evidence, your
16 Honor.

17 MR. WOLOSKY: Your Honor, I object on the
18 grounds that these minutes are as self-serving hearsay
19 statement of the defendants prepared on its face after
20 this litigation was commenced, many months after this
21 litigation was commenced, after the examination of the plaintiff
22 before trial, after the expiration of the contract by its
23 terms.

24 I also object to counsel introducing these
25 minutes through this witness because this witness, by his

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2 own testimony was not a director, he was not present at this
3 meeting, and has no personal knowledge of the underlying
4 statements in the minutes.

5 THE COURT: Where is the secretary of the
6 corporation?

7 MR. PANISH: The secretary took the minutes.

8 THE COURT: I will take counsel's statement that
9 these are minutes that are kept. If you want him to
10 bring the secretary we will do it but we will waste more
11 time

12 As far as your other point is concerned, there
13 is substance to that and you will have an opportunity to
14 cross examination and ask with respect to what meetings were
15 held subsequent to the fiscal year of 1972, how many meet-
16 ings were held and we know entry was made on the books up to
17 that date.

18 I will allow you to cross examine as to that.
19 Of course, I will admit it under Section 1732 Title 28,
20 but the weight to be given to it, the circumstances of the
21 resolution having been passed and the rest will be a matter
22 to be weighed by the trier of the facts. I will agree on
23 it that upon its face there should be some explanation
24 as to how it came about that in August 1974 the board
25 took action for the first time.

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2 (Defendants' Exhibit N is received in
3 evidence.)

4 Q Now, in respect to these board minutes, Mr.
5 Degnan, particularly the resolution contained on
6 page 3, and I will show you another copy which I have
7 (handing), with certain exclusions made computing this
8 2-1/2 per cent increment over net income.

9 A Yes.

10 Q Will you state what those exclusions are?

11 A Well, the exclusions, the net income from the
12 Steadley Company, extraordinary items -- I am sorry --

13 THE COURT: You haven't read it correctly, Mr.
14 Witness. You left something out, didn't you?

15 THE WITNESS: I asked for exclusions, your Honor.
16 Item 1 and 4 are inclusions; Items 2 and 3 are exclusions.

17 Q Now, the second item, the exclusion of net income
18 from operations of Steadley, during the course of your
19 employment with this defendant, did you know whether or not
20 the plaintiff, Mr. Gavin, in his case ever managed or super-
21 vised the Steadley companies?

22 A He did not.

23 Q In his years of employment, from April 5th of
24 1971 to about the week week of April, 1973, to your
25 knowledge how many times did the plaintiff go to the Steadley

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2 companies?

3 MR. WOLOSKY: Your Honor, I am going to object.

4 THE COURT: Objection sustained.

5 Q Did you then make a compilation from the re-
6 cords of the defendant concerning the net income from
7 operations for the Steadley Company?

8 A I did.

9 Q And what is that figure for fiscal 1971?

10 A I would like to correct that answer. I did not
11 make the computations of the net income from Steadley.
12 The books and records of the company in the ordinary course
13 of business were kept separate for Steadley and separate for
14 the combined tape operation. So that the records I used
15 were records prepared by the controller, treasurer, account-
16 ing division of Technical Tape, Inc. and Steadley prepared
17 on a regularly monthly basis in the regular ordinary course
18 of business. The figures I worked with were the Steadley
19 Company, Inc. figures which were used in the consolidated
20 figures certified by the independent public accountants.

21 And after having used those figures did you
22 arrive at what the net income from operations was of
23 Steadley for fiscal 1971?

24 MR. WOLOSKY: I object, your Honor, on the
25 grounds that the witness purporting now to give a summary

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2 of the books and records of the company which are not in evi-
3 dence and they are not before the Court.

4 THE COURT: I didn't hear the question. Read
5 the question.

6 (Question read.)

7 MR. WOLOSKY: Your Honor, the last answer of the
8 witness may be pertinent in this regard. He stated that
9 what he did was make a summary of the books and records of
10 the company and those books and records are not here today,
11 they are not in evidence, and what the witness is at-
12 tempting to do is to get in figures which are included in the
13 books and records of the company without offering those
14 books and records as evidence.

15 THE COURT: Where are the books and records?

16 THE WITNESS: Your Honor, the books and records
17 of the company are at New Rochelle, New York. I did
18 not compile these figures from the books and records.
19 I have with me a photostatic copy of the final figures for
20 1971, 1972 and 1973 which are part of the books and
21 records of the company which were prepared in the ordinary
22 course of business by the accounting department under the di-
23 rection of the treasurer and controller of the company.

24 THE COURT: Which company are you referring
25 to?

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2 THE WITNESS: Technical Tape, Inc. Basically
3 the numbers were prepared by the controller of Steadley
4 Company, Inc. The controller of Steadley Company, Inc.
5 submits them to New Rochelle. New Rochelle reviews them,
6 verifying their correctness.

7 In addition, these numbers were reviewed by
8 certified public accounts and no changes were made in these
9 numbers by the certified public accountants.

10 The financial officer at New Rochelle takes these
11 numbers from the Steadley Company and consolidates them
12 with comparable numbers received from the other divisions of
13 the company to produce the consolidated statements which
14 show up in the annual report.

15 THE COURT: I will take his figures.

16 Do you have any compilation in accordance with
17 this resolution?

18 THE WITNESS: Yes, sir.

19 THE COURT: You prepared this based on this
20 resolution?

21 THE WITNESS: Yes, sir.

22 THE COURT: Proceed.

23 Q Do you have that with you now, sir?

24 A Yes, I do.

25 MR. PANISH: I will offer it first, your Honor.

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2 I offer these in evidence, your Honor, at this
3 time.

4 (Pause.)

5 MR. WOLOSKY: Your Honor, may I take a minute
6 to look at these?

7 THE COURT: Yes.

8 (Pause.)

9 THE COURT: Where is the annual report that
10 went out to stockholders that is in evidence? Are you using
11 it there?

12 MR. WOLOSKY: I believe we are.

13 THE COURT: Are you using it?

14 MR. WOLOSKY: The witness has an extra copy.

15 (Pause.)

16 MR. WOLOSKY: Can we have these marked for
17 identification?

18 MR. PANISH: I offered them in evidence.

19 MR. WOLOSKY: Can we have these marked for
20 identification.

21 (Defendants' Exhibit O was marked for
22 identification.)

23 MR. WOLOSKY: May I inquire, your Honor?

24 THE COURT: On voir dire, yes.
25

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2 VOIR DIRE EXAMINATION

3 BY MR. WOLOSKY:

4 Q Mr. Degnan, I show you Defendants' Exhibit O for
5 identification and I ask you who prepare that?

6 A I did.

7 Q And when did you prepare it?

8 A Two weeks ago.

9 Q And were you instructed by counsel to prepare this?

10 A Yes.

11 Q And at that time did counsel explain to you that
12 this document would be used in this litigation?

13 A They didn't explain to me that the document would be
14 used in litigation, no.

15 Q Did you have when you prepared this your
16 August 22, 1974 minutes?

17 A Yes.

18 Q Now, I ask you as to 1972, you show a figure
19 for Steadley of 883. Could you tell me where you got
20 that?

21 THE COURT: \$883?

22 THE WITNESS: These figures are in thousands of
23 dollars.

24 Q \$883,000 as the income before uncrucial items.
25 Now, could you tell me where you got that figure from?

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2 A From a report prepared by the controller of
3 Steadley and verified by the controller of Technical Tape,
4 Inc.

5 Q Do you know when this document was prepared?

6 A This document was prepared approximately --

7 Q Do you know, do you have any personal knowledge
8 when that document was prepared?

9 A Yes. Approximately March 1973. Or early April,
10 1973. I can tell better if I saw the date the annual
11 figures were published.

12 Q Where was that document prepared? It was
13 prepared -- it wasn't prepared in New York, was it?

14 A The figures for Steadley were prepared in
15 Carthage, Missouri by the controllee of the Steadley
16 Division, submitted to New Rochelle and verified by the
17 accountants at New Rochelle, and subsequently verified by
18 the certified public accountants.

19 Q You were not present when they were prepared in
20 Carthage, Missouri?

21 A I was not.

22 Q And did you obtain this document from Carthage,
23 Missouri?

24 A I obtained this document -- no, I am sorry, no.

25 Q You did not?

UNITED STATES COURT OF APPEALS
for the Second Circuit

JOHN A. GAVIN,

Plaintiff-Appellee,

- against -

TECHNICAL TAPE INC., etal.,

Defendant-Appellants.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF New York

ss.:

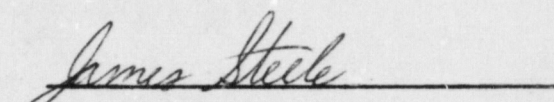
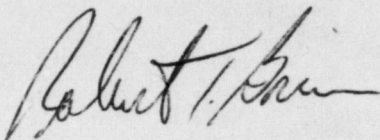
I, James Steele, being duly sworn,
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
250 West 146th, Street, New York, New York
That on the 1st day of May 1975 at 530 Fifth Ave, N.Y. N.Y.

deponent served the annexed *Appendix* upon

Parker Chapin & Flattau

the Attorneys in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the Attorney(s) herein.

Sworn to before me, this 1st
day of May 19 75


JAMES STEELE

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1978